PROHIBITING PERMANENT REPLACEMENT OF STRIKING WORKERS

(102-6)

HEARING

BEFORE THE

SUBCOMMITTEE ON AVIATION

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION HOUSE OF REPRESENTATIVES

ONE HUNDRED SECOND CONGRESS

FIRST SESSION

ON

H.R. 5

TO AMEND THE NATIONAL LABOR RELATIONS ACT AND THE RAILWAY LABOR ACT TO PREVENT DISCRIMINATION BASED ON PARTICIPATION IN LABOR DISPUTES

APRIL 10, 1991

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CONTENTS

	Page
Summary of Subject Matter	v
H.R. 5—To amend the National Labor Relations Act and the Railway Labor Act to Prevent Discrimination Based on Participation in Labor Disputes	xi

TESTIMONY

Babbitt, J. Randolph, president, Air Line Pilots Association	38
Fortney, David S., Deputy Solicitor of Labor for National Operations, U.S. Department of Labor	16
Frankovich, Vicki, president, Independent Federation of Flight Attendants	38
Kourpias, George, J., president, International Association of Machinists and Aerospace Workers	38
Landry, James E., senior vice president and general counsel, Air Transport Association of America, accompanied by: Frank Berardino, senior vice president and chief economist, Gellman Research Associates, Inc., and Robert J. DeLucia, vice president and general counsel, Airline Industrial Relations Conference	67
Leitz, George, international president, Transport Workers Union of America	38
Lenoir, Juliette D., national vice president, Association of Flight Attendants	38
Potter, Edward E., president, Employment Policy Foundation, accompanied by Daniel V. Yager, Esq.	74
Westfall, David, John L. Gray Professor of Law, Harvard Law School	74

PREPARED STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

Ballenger, Hon. Cass, a Representative in Congress from North Carolina	8
Clinger, Hon. William F., Jr., a Representative in Congress from Pennsylvania	3
Costello, Hon. Jerry L., a Representative in Congress from Illinois	14
Kolter, Hon. Joe, a Representative in Congress from Pennsylvania	12
Poshard, Hon. Glenn, a Repesentative in Congress from Illinois	15

PREPARED STATEMENTS OF WITNESSES

Babbitt, Capt. J. Randolph	95
Fortney, David S	102
Frankovich, Vicki	108
Kourpias, George J	116
Landry, James E	123
Leitz, George	146
Lenoir, Juliette D	149
Potter, Edward E	160
Westfall, David	185
Yager, David	160

SUBMISSION FOR THE RECORD

Ballenger, Hon. Cass, a Representative in Congress from North Carolina, definition paper: "Fired" vs "Replacement"	54

ADDITIONS TO THE RECORD

Alliance to Keep Americans Working, press releases	202
Siegel, Robert A., Partner, O'Melveney & Myers, Los Angeles, CA, statement	210

Committee on Public Works and Transportation

Congress of the United States
House of Representatives
Room 2165, Rayburn House Office Building
Washington, DC 20515
TELEPHONE: AREA CODE 202, 225-4472

April 5, 1991

To: Member of the Subcommittee on Aviation.

From: Subcommittee on Aviation staff.

Re: SUMMARY OF SUBJECT MATTER for hearing on H.R. 5, THE STRIKER REPLACEMENT BILL, on April 10, 1991, at 10:30 a.m. in Room 2253 RHOB.

The hearing will receive testimony on H.R. 5, a bill which would amend the National Labor Relations Act and the Railway Labor Act to prohibit employers from permanently replacing striking employees who are willing to return to work after a strike. H.R. 5 has been jointly referred to the Committee on Education and Labor (which has jurisdiction over the National Labor Relations Act governing employees in most industries), the Committee on Energy and Commerce (which has jurisdiction over the Railway Labor Act provisions governing railroad employees), and the Committee on Public Works and Transportation (which has jurisdiction over Railway Labor Act provisions governing airline employees). The bill has 206 cosponsors.

I. Background on the Hiring of Replacements for Striking Employees. Both the National Labor Relations Act and the Railway Labor Act (RLA) guarantee employees the right to strike. With respect to the RLA (over which the Committee on Public Works and Transportation has jurisdiction) the Supreme Court stated in Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969):

> [E]mployees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes....Whether the source of this right be found in a particular provision of the Railway Labor Act or in the scheme as a whole, it is integral to the Act. (p. 384-385)

In 1938, shortly after the passage of the National Labor Relations Act, the Supreme Court announced the so-called Mackay rule, which provides that an employee's right to strike is limited by an employer's right to permanently replace striking employees. The Mackay rule was set forth by the Supreme Court as follows.

> [It is not] an unfair labor practice [for an employer] to replace....striking employees with others in an effort to carry on the business....and [the employer] is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [an employer] to those who have accepted employment during the strike that if they so desire their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. (NLRB v. Mackay Radio Co., 304 U.S. 333 at 345)(1938)

The Supreme Court has held that the Mackay rule also applies to the Railway Labor Act. In addition, in the case of Trans World Airways, Inc. v. Independent Federation of Flight Attendants, 489 U.S. 426 (1989), the Supreme Court held that under the Railway Labor Act an employer is not required to lay-off junior employees who have returned to work during a strike in order to reinstate more senior full-term strikers at the conclusion of a strike.

Although the Mackay rule allowing the hiring of permanent replacements during a strike has been in effect for more than 50 years, it appears that employers made very limited use of this right until the 1980s. An important impetus for wider employer use of

the right to hire permanent replacements was President Reagan's 1981 decision to permanently replace striking air traffic controllers.

A recent study by the General Accounting Office estimated that in strikes reported to the Federal Mediation and Conciliation Service in 1985 and 1989, employers announced that they would hire permanent replacements in about one-third of the strikes and actually hired permanent replacements in about 17% of all strikes in each year. A related GAO survey concluded that many employers and union representatives involved in strikes in 1985 and 1989 believed that permanent strike replacements were hired more frequently in the late 1980s than in the late 1970s.

In the airline industry, permanent replacements have been hired in five of seven strikes since 1981. These include:

- Continental Airlines (1985) - Permanent replacements hired for pilots (2,000), machinists (over 5,000) and flight attendants (1,200);
- Alaska Airlines (1985) - Permanent replacements hired for machinists;
- United Airlines (1985) - 570 permanent replacement pilots hired, but they refused to cross picket lines;
- TWA (1986) - 2,350 permanent replacements hired for flight attendants;
- Eastern (1989) - Permanent replacements hired for flight attendants (1,800), machinists (4,500) and pilots (1,100).

II. Provisions of H.R. 5. H.R. 5 was introduced on January 3, 1991, and now has 206 cosponsors. Section 1 of the bill amends the National Labor Relations Act to make it an unfair labor practice to offer or grant the status of permanent replacement employee to an individual for performing work during a strike. Additionally, H.R. 5 makes it an unfair labor practice to otherwise grant employment preference to an individual who worked or

was willing to work during a labor dispute, over an individual who was employed at the commencement of the dispute, exercised the right to strike, and is working for or has unconditionally offered to return to work for the employer. Section 2 of the bill amends the Railway Labor Act to prohibit employers from taking the actions which are made unfair labor practices in Section 1.

As indicated above, H.R. 5 was referred to three House committees: Education and Labor, Energy and Commerce, and Public Works and Transportation. The Subcommittee on Labor-Management Relations of the Education and Labor Committee held hearings on March 6 and 13. On March 13, that Subcommittee marked-up the bill and reported it to the Full Committee without amendment. A Full Committee mark-up is scheduled for April 11. The Committee on Energy and Commerce has scheduled a Subcommittee hearing for April 9.

III. Arguments For and Against H.R. 5.

a) Arguments For H.R. 5. The main arguments which have been advanced in support of H.R. 5 are:

1) Allowing employers to hire permanent replacements and to give preference to striking employees who return to work effectively destroys the right to strike. Existing law recognizes that the right to strike would be of little value if an employer could discipline or discharge workers who strike and for this reason existing law prohibits employers from taking such measures. Yet at the same time existing law allows employers to hire permanent replacements which, from the employee's point of view, is indistinguishable from a discharge.

2) Allowing the hiring of permanent replacements gives anti-labor employers a powerful weapon for "union busting". By taking advantage of the Mackay rule, an anti-union employer can refuse to make any concessions in

collective bargaining, force employees to strike, and then hire permanent replacements who are non-union.

3) Allowing the hiring of permanent replacements gives employers a strong means of discouraging employees from organizing unions. With the Mackay rule in effect, employers can argue to workers that if they select a union, the union will lead them into a strike and they will then loose their jobs to permanent replacements.

4) Allowing the hiring of permanent replacements gives employers disproportionate economic power. Although employees have the right to strike and temporarily shut-down the company, employees cannot shut-down a company indefinitely without imposing serious harm on themselves. By contrast, under the Mackay rule, employers can inflict permanent harm on employees by hiring replacement workers.

5) Employers have the ability to continue to operate during a strike without hiring permanent replacements. Many employers have been able to operate during a strike by using non-strikers, returning strikers, non-union personnel, temporary replacements, or by scaling down the operation of the company.

6) The fact that the Mackay rule has been on the books for more than 50 years does not establish that it would shift a long-standing economic balance of power to change the rule at this time. The right to hire permanent replacements under the Mackay rule was rarely used until the last 10 years.

b) Arguments Against H.R. 5.

The Administration, employer groups, and others who oppose H.R. 5, have raised the following arguments.

1) The right to hire permanent replacements has been part of the economic balance between management and labor for more than 50 years, and the balance should not be changed at this time.

2) If H.R. 5 was enacted, there would be no check on a union's desire to strike, and we could expect an increase in strikes.

3) The decline in strikes over the past decade shows the value of employers having the power to hire permanent replacements.

4) Although large companies may have the ability to withstand a strike or operate during a strike without hiring permanent replacements, small and struggling businesses will be unable to operate during a strike unless they have the right to hire permanent replacements.

5) The Mackay rule is more limited than the supporters of H.R. 5 have recognized. The Mackay rule only gives employers the right to hire permanent replacements for a strike on economic issues. Employers are not permitted to hire permanent replacements when a strike is a protest against unfair labor practices.

6) In the airline industry, a change in the Mackay rule is particularly inappropriate. Airline employees are well compensated. Much of the industry is in financial distress, and any tilt towards labor could cause the demise of some airlines. In addition, the Railway Labor Act gives airline employees greater economic power than the NLRA; RLA, unlike NLRA, permits unions to conduct secondary boycotts (actions against companies other than the one against which a strike is directed).

IV. Expected Witnesses. The Subcommittee expects to receive testimony from witnesses representing the Administration, airline unions and airline management.

102D CONGRESS
1ST SESSION

H. R. 5

To amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 3, 1991

Mr. CLAY introduced the following bill; which was referred jointly to the Committees on Education and Labor, Energy and Commerce, and Public Works and Transportation

---

A BILL

To amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PREVENTION OF DISCRIMINATION DURING AND AT THE CONCLUSION OF LABOR DISPUTES.

Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting "; or", and

(2) by adding at the end thereof the following new paragraph:

"(6)(i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute, or

"(ii) to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—

"(A) was an employee of the employer at the commencement of the dispute;

"(B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute; and

"(C) is working for, or has unconditionally offered to return to work for, the employer.".

SEC. 2. PREVENTION OF DISCRIMINATION DURING AND AT THE CONCLUSION OF RAILWAY LABOR DISPUTES.

Paragraph Fourth of section 2 of the Railway Labor Act (45 U.S.C. 152) is amended—

(1) by inserting "(a)" after "Fourth."; and

(2) by adding at the end the following:

"(b) No carrier, or officer or agent of the carrier, shall—

"(1) offer, or grant, the status of a permanent replacement employee to an individual for performing work in a craft or class for the carrier during a dispute involving the craft or class; or

"(2) otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a dispute over an individual who—

"(A) was an employee of the carrier at the commencement of the dispute;

"(B) has exercised the right to join, to organize, to assist in organizing, or to bargain collectively through the labor organization involved in the dispute; and

"(C) is working for, or has unconditionally offered to return to work for, the carrier.".

○

PROHIBITING PERMANENT REPLACEMENT OF STRIKING WORKERS

WEDNESDAY, APRIL 10, 1991

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON AVIATION,
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:40 a.m. in room 2253 Rayburn House Office Building, Hon. James L. Oberstar [chairman of the subcommittee] presiding.

Mr. OBERSTAR. The Subcommittee on Aviation will please come to order.

We meet today to take testimony on H.R. 5, a bill to amend the National Labor Relations Act and the Railway Labor Act to prohibit employers from hiring permanent replacement workers during a labor dispute as well as to prohibit employers from discriminating against employees who return to work on the resolution of a labor dispute. Our jurisdiction arises from those provisions of the Railway Labor Act that govern airline employees.

Hiring replacement workers is not a new phenomenon in labor-management relations. It has been intensively applied for the last decade, but this is a practice that characterized management actions for over 200 years of the industrial revolution. It was what an employer did before employees could organize to bargain collectively to improve their economic condition. When an employer was dissatisfied with an employee, someone else took his place.

The right to organize, to bargain collectively, on the contrary, is the newer phenomena in the history of the industrial revolution, dating effectively from the 1930s in the Wagner Act and successive amendments thereto. So replacing strikers is a reversion to the earlier one-sided relationship of management and labor.

I want to say that I speak from personal experience. Growing up in the iron ore mining country of Northern Minnesota, my father worked on the track gang in the underground and in the open pit mine. Where I worked in the mines, a strike was not something labor undertook lightly and it was not undertaken without personal consequence.

In the 1940s and 1950s we didn't have strike funds. We didn't have support organizations across the country. In the 159-day steel strike, I remember so very well. I was just a child at the time and didn't fully understand all the grand principles of labor-management relations and labor economics, but I knew one thing. I came home on Friday afternoon from school and we had soup. I said,

"Soup again?" My father said, "You're damn right. Tomorrow we throw the soup bone up in the air and if it comes down, you get soup next week."

We all lost in strikes, but principles were important. People were willing to lose income, to experience depravation and hardship for a principle. Certain rights, benefits, hours of work, vacation time, and health benefits were important enough to lay your economic condition on the line. Eventually it would be negotiated out and both parties would go back to work, but the replacement concept throws the whole balance of labor-management relations into a cock pen.

Collective bargaining is meaningless if one side can dismiss the other. That is what happened. That's what happened in 1981 with the Professional Air Traffic Controllers Organization. It's been happening with increasing frequency in the airline industry. We are here to take testimony on legislation to redress the imbalance and put the relationship back on the even keel that it should be.

The Chair now recognizes the gentleman from Arkansas, ranking member of the full committee, Mr. Hammerschmidt, with regrets that our colleague, Mr. Clinger, is in Pennsylvania attending the funeral or other memorial events in honor of our departed colleague, Senator Heinz. We greatly regret the loss of our dear friend.

Mr. Clinger's prepared remarks will appear in the record at this point.

[Mr. Clinger's prepared statement follows:]

Statement of
The Honorable William F. Clinger, Jr.
Before the Aviation Subcommittee Hearing on
H.R. 5

Mr. Chairman, the collective bargaining process is alive and well. For over 50 years, labor and management have been able to negotiate wage and compensation packages that are both fair to the employee and helped keep our industries on a competitive footing.

This process has not been without significant pain, as witnesses will attest this morning. There have been cases where companies have chosen to disenfranchise segments of their workforce, and in a couple of rare instances, entire workforces, in order to eliminate a union presence on their property.

Recent events in our economy are presumed to encourage employers to use replacement workers with increasing frequency. The LBO binge fostered by Wall Street during the 1980's left many companies saddled with huge debts, often forcing them to reduce their labor costs through whatever means available. In addition, we now find ourselves competing in a global economy, with huge dissimilarities in wage and material costs on a country by country basis.

It is my belief that these circumstances will no doubt result in serious and significant new labor/management negotiations here at home as our industries strive to compete against foreign-produced goods.

H.R. 5 is a misguided effort that is portrayed by its supporters as a means to "even" the playing field. To the contrary, this legislation will dramatically skew the collective bargaining process to the point that management and owners will struggle to survive, failures will increase, and jobs will permanently disappear.

H.R. 5, in my opinion, holds out a false promise of job security. If it is enacted, it will have the very opposite effect. It has the very real promise of throwing many employees out of work if labor costs escalate high enough to push the prices of goods and services beyond the reach of consumers. They will instead turn to foreign produced goods, and jobs will be lost.

Although I am strongly opposed to H.R. 5 in its present form, I find myself in some sympathy with its objectives because of the manner in which some in the air carrier industry have acquitted themselves during the last decade. There have been several well publicized instances where management has used replacement workers not as a bargaining weapon to negotiate contracts in good faith, but simply as a means to drive unions off of their property. Those efforts were seriously misguided, and in the end, the companies suffered dire financial harm.

Despite these rare episodes, the air carrier industry stands at the top of the American economy with a workforce that is one of the most highly compensated. Indeed, their wages are the envy of many, yet air travel continues to thrive and I see no reason why employees should not share equally in the profits earned by their employers.

The prospect of H.R. 5 casts a pall on these achievements. I fear that the highly skilled workforce needed to successfully operate an air carrier would use the new powers granted by this legislation to push ticket prices to a point that many people could no longer afford to travel. Jobs would be lost. The number of air carriers would shrink even further, resulting in a reduction in the purchase of goods and services from vendors, further damaging the economy.

Mr. Chairman, I regret the decision of our House leadership to promote H.R. 5 as a pro-labor bill. In all sincerity, I believe this bill will harm industry, its employees, and ultimately, our economy.

Mr. OBERSTAR. Mr. Hammerschmidt.

Mr. HAMMERSCHMIDT. Thank you very much, Mr. Chairman. I, too, want to state that our distinguished ranking member, Bill Clinger, can't be here because of the sad events surrounding the death of our departed friend, John Heinz.

Mr. Chairman, since 1938, employers have had the right to maintain their business during a strike by permanently replacing strikers. This right is derived from the Supreme Court decisions known as *National Labor Relations Board* v. *Mackay Radio and Telegraph Company*. In that case, the high court ruled that an employer, when faced with an economic strike, may carry on its business with replacement employees and at the end of the strike is not required to displace these new employees.

The bill before us now, H.R. 5, would overturn this case and the 50 years of precedents developed under it. It would upset the delicate balance between labor and management under which employees may strike and employers may continue operating during the strike.

Of course this bill does not stop employers from hiring temporary workers or from using supervisors to do the work. Nor does it explicitly require the employer to shut down during the strike. However, its practical impact will be to prevent an employer from obtaining the necessary labor force during a strike. As a result, in many cases, the business may be forced to either shut down or capitulate.

It should be apparent that this is a very controversial piece of legislation. Therefore, I would like to express my thanks and appreciation to you, Mr. Chairman, for agreeing to hold a hearing on it.

I know that there may have been some who urged you to dispense with a hearing because one was held in another committee. But our committee has important responsibilities under the Railway Labor Act to oversee legislation affecting airline labor. Therefore, it is important there be a full airing of the issues before our committee as well.

I am pleased that we will be able to have a full discussion of the issues here today and that all sides will have an opportunity to present their views. I look forward to the testimony and to the subcommittee's debate on the issues that are raised.

Thank you, Mr. Chairman.

Mr. OBERSTAR. I thank the gentleman for those comments. Precisely because of the Railway Labor Act and the unique role of the airline industry and airline labor we need to have this hearing to focus on those aspects of this issue. That is the purpose of today's hearing. We intend to have every viewpoint fully acknowledged.

If there are other members who feel a pressing, urgent need to make an opening statement, the Chair would gladly recognize them, but would welcome members including their comments in the record.

The gentlewoman from Missouri?

Ms. HORN. Since I am from Missouri and since TWA is in my district, I did at least want to put that much into the record. I will submit the rest of my statement.

I wanted to point out the example that we have of TWA and the great interest of workers in keeping their companies alive and healthy. At TWA, over the last 5 years, the employees have given back $1.5 billion to keep the company going. They are ready right now to do that again, to offer another $137 million a year in concessions in order to have a new buyer for this airline.

It is very much in the interest of airline employees and employees of all industries to keep their companies healthy in order to keep their jobs. People want to have jobs. Being permanently replaced is the same as being fired.

Mr. OBERSTAR. I thank the gentlewoman.

The gentleman from North Carolina?

Mr. BALLENGER. I would just like to make a short statement. I have a formal statement to be included in the record.

Considering that everybody knows I am completely unbiased in this particular area, I would like to say that striker replacement, or the *Mackay* doctrine, went into effect in 1938. It has been used 250 times since that period, and only 22 times since 1980. So it has been a very common thing in the past.

One thing that never comes out in any of the discussions I've heard is the fact that if you have an economic strike and you do have permanent replacements, the striking workers do have preferential rehire at the end of the strike. I think that the International Paper Company strike in Maine, which is one of the major ones that everybody talks about, when 1,000 workers went out on strike, out of that 1,000, 300 have used the preferential rehire and are now working and back on the job.

My personal feeling about this particular bill is that unions now represent 12 percent of the workers in the country and its percentage is shrinking on a regular basis. This bill is a union effort to organize and increase their strength. There will be an amendment, I understand, to exempt non-union shops.

This, to my way of thinking, is an ideal arrangement to develop union organizing throughout the whole United States because the first thing you can say to a non-union shop is, "Fellahs, do you realize that you might get fired? But if you join us and join the union, we can guarantee you that from now on you will never be fired." In my opinion, this is a very one-sided effort and would do away with 50 years of history of effort by both management and labor to work to solve problems that we have. It has worked well in the past, and I would like to see it remain the same.

[Mr. Ballenger's prepared statement follows:]

THE HONORABLE CASS BALLENGER
OPENING STATEMENT
HEARING ON H.R. 5
THE ANTI-COMPETITIVENESS BILL
APRIL 10, 1991

Mr. Chairman, for over 50 years labor laws have drawn a distinction between workers who are forced to walk off their jobs due to an employer's unfair labor practices, and workers who voluntarily strike for higher wages, or better benefits, or improved working conditions. The former is called an unfair labor practice dispute; the latter is an economic strike.

The law balances the legal and economic rights of strikers and employers differently, depending on the nature of the labor dispute. There are sound economic and labor policies underlying these distinctions.

In an unfair labor practice strike -- one which is driven by an employer's illegal conduct, including his refusal to bargain in good faith with a certified union representative -- returning strikers are entitled to automatic reinstatement following the strike. Any replacement workers hired are only temporary and must be let go to make room for the returning strikers.

In an economic strike -- one where workers demand higher pay, for example -- returning strikers are not entitled to automatic reinstatement. They are entitled, however, to preferential rehire to the same or substantially equivalent jobs as vacancies occur. Replacement workers who were willing to work for the SAME wages or benefits rejected by the strikers may be given

permanent positions.

Current labor policy is designed to prevent every garden variety economic demand from triggering a strike, or from unions having unrestricted economic leverage during bargaining and strikes. H.R. 5 would remove the distinction between an unfair labor practice dispute and an economic strike. Under H.R. 5, an employer's inability or unwillingness to accede to a union's economic bargaining demand, no matter how unreasonable, would be treated the same as if the employer had committed an unfair labor practice. Workers who strike for an economic reason, no matter how outrageous, would be assured of returning to work any time they chose to do so.

The Air Transport Association, an organization that will be appearing before the sucommittee a little later today reports that from 1981 to 1990, there were only 7 strikes in the airline industry. This is considerably fewer strikes than were reported in the previous decade when 26 strikes occurred. While the strikes in the airline industry remain some of the most highly publicized, I would also like to point out that this industry is one of the most highly unionized in the U.S. with around 60 percent of the workforce belonging to a union.

For the airline industry, labor costs represent its the largest operating expense -- almost $50,000 per employee -- double the national average for employee compensation. Last year, the airlines experienced their worst year -- losing $2

billion -- with little hope of improvement for 1991.

As a Member with a ~~strong~~ small business background, I recognize ~~the adverse effects of~~ this BILL CREATES risk-free economic strikes especially during our current downturn in the economy. It is essentially that this subcommittee and the Congress not ~~restrict~~ BIND business with ~~further non-competitive measures~~. GUARANTEED RISK FREE STRIKES

While the airline industry is experiencing huge losses, we do not need H.R. 5 which provides a recipe for increasing labor CONFLICTS & COSTS ~~costs~~, losing American jobs permanently to foreign workers, BECAUSE OF ~~as well as lower levels of output and less income for the country as a whole~~. BEING NON COMPETITIVE.

If the federal government is truly interested in improving employees working conditions, it should create a more productive and competitive environment for business, not weighing it down with ~~heavy mandates~~ -- AN INABILITY TO NEGOTIATE LABOR PROBLEMS ~~like the anti-business, anti-competitive H.R 5~~.

H.R. 5 is bad labor policy, unfair, and not what our country or economy needs. I urge my colleagues to oppose this legislation

Mr. OBERSTAR. The gentleman from Tennessee.

Mr. CLEMENT. Mr. Chairman, I would like to commend you for calling this hearing on H.R. 5, the striker replacement bill. This bill, of which I am a co-sponsor, would reestablish the right to strike that has been significantly weakened by employer use of permanent replacement workers.

I certainly support the sponsor's intent of the legislation, however, I am deeply troubled that H.R. 5 would apply to non-union employees who engage in concerted activities under the protection of the National Labor Relations Act.

Mr. Chairman, I would like the members of this subcommittee to know that I plan to offer an amendment to clarify the sponsor's intent of the legislation, that this legislation extends to union situations only and would exempt non-union shops.

Mr. OBERSTAR. I thank the gentleman for those remarks.

The clarification to which the gentleman referred will be visited and revisited time and again throughout the testimony and we will have a better idea of the refinement of the bill with respect to that particular by day's end.

I would like to insert into the record at this point statements received from our colleagues, Representatives Kolter of Pennsylvania, and Costello of Illinois.

[Statements referred to follow:]

Joe Kolter

OPENING STATEMENT OF CONGRESSMAN JOE KOLTER

SUBCOMMITTEE ON AVIATION

HEARING ON HR 5, THE STRIKER REPLACEMENT BILL

APRIL 10, 1991

I'd like to thank you, Mr. Chairman, for calling this morning's Aviation Subcommittee hearing to examine HR 5 as it relates to the aviation industry and the Railway Labor Act. As a cosponsor, I make no secret of my strong support for this bill.

As we review the history of strikes in this country, we find that between the years of 1938, when the U.S. Supreme Court issued its Mackay ruling, and 1981, when President Reagan fired the striking air traffic controllers, there existed an unofficial "gentleman's agreement" between management and labor that workers' rights to strike would be respected. The Supreme Court ruled that striking workers could be replaced, but management, for the most part, respected striking workers' seniority rights and allowed them to return to their respective jobs when work stoppages ended. President Reagan's decision to fire the air traffic controllers began a new era of distrust and deception between management and labor.

What has happened to the right to strike in this country? In past years, the right to strike without the fear of reprisal was honored as a last resort collective bargaining tool. Today, however, workers can be "permanently replaced" for choosing to exercise this basic right. I see no difference between "permanently replacing" a striking worker and firing a worker for going on strike.

In the last decade, we witnessed several examples of airline work stoppages where striking workers were "permanently replaced." Those strikes included Continental, Alaska, United, TWA and, most notorious of all, Eastern. Frank Lorenzo embodies everything that is wrong with labor/management relations today. His policy of discarding experienced, striking workers in favor of cheap, scab replacements seems to epitomize the actions of some of our more unscrupulous employers. Because of people like Mr. Lorenzo, U.S. workers need the protections afforded by HR 5.

Without a guaranteed right to strike, management "holds all the cards" at the bargaining table. If workers know they can be "permanently replaced" for exercising the option to strike, they have little choice but to continue working and agreeing to whatever contract demands or offers are made by management.

Mr. Chairman, I feel our workers deserve better. If American businesses are willing to withhold this basic right from their

workers, I feel that we, as responsible Members of Congress, must guarantee them this right.

I thank all the witnesses for coming before us today to testify on the need for HR 5. I look forward to hearing your testimony.

Thank you, Mr. Chairman.

OPENING STATEMENT

BY U.S. REP. JERRY COSTELLO, ILLINOIS

SUBCOMMITTEE ON AVIATION

HEARING ON H.R. 5, TO PREVENT THE

PERMANENT REPLACEMENT OF STRIKING WORKERS

APRIL 10, 1991

Mr. Chairman, today we will be discussing one of the most important pieces of legislation before the 102nd Congress, the Striker Replacement bill. H.R. 5 will remedy an inequity in U.S. labor law which has been increasingly abused since President Ronald Reagan fired striking members of the air traffic controllers union in 1981. Under current law, strikers cannot be fired, but they can be permanently replaced. This distinction is meaningless and has caused a great deal of hardship to many employees who have had the door shut in their face despite good-faith attempts at collective bargaining and moderate demands.

I look forward to our consideration of this important issue today, and I hope that the bill can be moved expeditiously through this Subcommittee and the full Committee on Public Works and Transportation. We should resolve this problem as quickly as possible, to rebuild confidence in the collective bargaining process.

OPENING REMARKS OF CONGRESSMAN GLENN POSHARD

SUBCOMMITTEE ON AVIATION

10:30 a.m., 2253 RAYBURN BUILDING

APRIL 10, 1991

MR. CHAIRMAN, I AM GLAD THAT UNDER YOUR LEADERSHIP THE AVIATION SUBCOMMITTEE IS PROCEEDING QUICKLY WITH ITS CONSIDERATION OF H.R. 5, THE STRIKER REPLACEMENT BILL. AS A COSPONSOR AND STRONG SUPPORTER OF THIS IMPORTANT PIECE OF LEGISLATION, I AM ESPECIALLY GLAD WE ARE HOLDING TODAY'S HEARING AND THAT WE WILL MARK-UP THE BILL TOMORROW.

I BELIEVE THAT NOW IS THE TIME TO ENACT EFFECTIVE STRIKER REPLACEMENT LEGISLATION BECAUSE OF THE CHANGES WE HAVE SEEN IN LABOR-MANAGEMENT RELATIONS OVER THE PAST DECADE. SINCE THE EARLY 1980'S WE HAVE SEEN A DRASTIC RISE IN THE NUMBER OF LEVERAGED BUYOUTS, CORPORATE MERGERS AND ACQUISITIONS, DEBT RESTRUCTURING, AND BANKRUPTCY PROCEEDINGS.

IN MANY CASES, THE RESULT OF THESE ACTIVITIES HAS BEEN A DEVALUATION OF THE WORTH OF AMERICAN WORKERS. COMPANIES HAVE ENDURED STRIKES BY HIRING REPLACEMENT WORKERS AND WEAKENING OR ELIMINATING THEIR UNIONIZED LABOR FORCE. INSTEAD OF FIRING STRIKERS AND HIRING REPLACEMENT WORKERS, WE NEED TO PASS H.R. 5 BECAUSE IT WILL ENCOURAGE FIRMS TO NEGOTIATE AND SETTLE CONTRACT DISPUTES.

Mr. OBERSTAR. Our first witness today is making his first appearance before this subcommittee, Mr. David Fortney, Deputy Solicitor of Labor for National Operations for the Department of Labor. Welcome, Mr. Fortney, to the subcommittee. We are happy to have your testimony.

TESTIMONY OF DAVID S. FORTNEY, DEPUTY SOLICITOR OF LABOR FOR NATIONAL OPERATIONS, U.S. DEPARTMENT OF LABOR

Mr. FORTNEY. Good morning, Mr. Chairman and members of the subcommittee. It is indeed a pleasure to be here and to have this opportunity to express to you the views of the Administration on H.R. 5.

As the subcommittee knows, this bill would amend both the National Labor Relations Act and the Railway Labor Act to prohibit employers from utilizing permanent replacement employees during a labor dispute, and from granting employment preferences at the conclusion of a labor dispute. As Secretary Martin stated in her testimony on March 6th before the Labor-Management Relations Subcommittee of the House Education and Labor Committee, the Administration opposes H.R. 5, and if the bill were presented to the President, his senior advisors would recommend a veto.

You have asked that we direct our comments to the Railway Labor Act. However, it must be noted that the impact of H.R. 5 would be felt well beyond the railroad and air transport industries, which fall within the purview of the Railway Labor Act. This legislation would override 60 years of law and experience in collective bargaining. This process, though not painless, has served the public interest well, and has contributed to the economic well-being of this country by reducing labor strife and encouraging dispute settlement.

One of the Administration's primary objectives is to further America's productive and competitive capacities in the face of stiff competition in global markets, increasingly sophisticated technologies, and shifts in workforce composition. Modern labor management relations exist in an environment where the parties have the ability to resort to a mix of cooperation and confrontation in testing each other's bargaining positions and resolve.

The National Labor Relations Act and the Railway Labor Act reflect this balance. They provide a dynamic framework that is flexible enough to govern cooperative dispute resolution as well as the parties' use of confrontational economic weapons such as strikes. If enacted, H.R. 5 would eliminate a major check on precipitous striking, promote increased labor unrest, and disrupt the flow of commerce.

The 1926 Railway Labor Act and the 1935 National Labor Relations Act arose from a common purpose: To reduce labor strife and thereby avoid interruption to the flow of commerce by protecting the right of employees to organize and bargain collectively. Though the objectives are similar, and both statutes reflect a primary reliance upon voluntary rather than compulsory means of settlement of labor disputes, the RLA provides for extensive negotiation and

mediation procedures that must be complied with before the parties are permitted to resort to self-help.

Conversely, while under the NLRA the parties also are required to bargain in good faith, the use of mediation is voluntary, and the parties, absent contractual restrictions, are permitted to employ economic weapons such as a strike or a lockout to pursue bargaining objectives.

The differences between the RLA and the NLRA resulted from a number of factors. For example, the economic climate in 1935 was vastly different from that of 1926. Further, the RLA was fashioned to govern labor relations in a single industry—thereafter the act was extended to air carriers in 1936—with a workforce that was national in scope. Most important, perhaps, was that rail strikes were considered a severe threat to national security.

Accordingly, the law was designed to defer the utilization of economic weapons until the weight of public opinion had been brought to bear on the dispute. The RLA empowers the President of the United States to create an emergency board whose recommendations, though non-binding, are made public and often form the basis of an agreement.

It is also important to emphasize that the RLA prohibits strikes, and therefore the permanent replacement of strikers, until bargaining parties have completed intensively supervised negotiations. Further, this mediatory effort continues until the National Mediation Board deems that further mediation is futile. Even at this obvious point of impasse, the parties are not yet free to utilize economic weapons.

The Railway Labor Act mandates that the NMB endeavor to persuade the parties to submit their controversy to arbitration. Finally, those constraints continue as the NMB determines whether a recommendation to convene an emergency board should be forwarded to the President, and, if so recommended and convened, until the emergency board issues its report for the consideration of the President.

Notwithstanding this statutory emphasis on mediation, the RLA shares with the NLRA adherence to the principle that labor disputes are best resolved through voluntary accord rather than imposition of substantive terms by a third party.

Since the passage of the Railway Labor Act in 1926, organized labor and employers have developed sophisticated economic weapons in pursuit of bargaining demands. Generally, if the economic weapons utilized by the bargaining parties do not threaten the bargaining process or a union's representational status, and the parties have adhered to the deferral procedures of the RLA, Federal courts, mindful of the principle of industrial self-government, have been loath to interfere.

We are concerned that if the right to permanently replace strikers were prohibited, it would make use of the strike weapon more likely. The system, as it exists to day, has proven to be in the public interest. It furthers the objective of the NLRA and RLA, which is to promote labor peace by encouraging voluntary agreements governing relations between unions and employers. Indeed, given that the great majority of the rail industry workforce is

unionized, a shift in the collective bargaining balance would be more pronounced than in the remainder of the private sector.

In sum, the rules that govern collective bargaining and the use of replacement workers under the RLA were well-conceived and have permitted that process to function as designed while providing adequate protection to all parties.

In conclusion, if enacted, H.R. 5 would destroy a prime component of the economic balance in RLA collective bargaining. No data have been presented that would indicate that this aspect of our Nation's system of labor/management relations, balanced through 60 years of scrutiny, is in need of revision. Indeed, the evidence illustrates the value and continuing strength of our Nation's labor policies.

I would like to note that there certainly have been strikes in which deleterious behavior by some who support the union has brought voices crying for punishment for all. Similarly, there have been times a particular business or employer will act in a way which brings support from no one. But that does not and should not mean we should change the rules which have served the majority of those representing either side in any labor or management dispute. The process has worked.

For these reasons, the Administration opposes the enactment of H.R. 5, and as I noted at the outset, if the bill were presented to the President, his senior advisors would recommend that he veto it.

With that, Mr. Chairman, I will be pleased to answer questions from you or the other members of the subcommittee.

Mr. OBERSTAR. Thank you very much, Mr. Fortney. The Chair will observe that we will adhere rigorously to the 5-minute rule as measured on my Timex.

[Laughter.]

Mr. OBERSTAR. I have to take issue with your conclusion that the legislation tilts the relationship to labor. The current situation tilts the balance of power in favor of management. Professor W.B. Gould of the Stanford University Law School has made an observation of this *Mackay* rule. I will just read this comment for your response.

> Every year I teach my students the rules relating to the strike weapon and labor law. I explain practical significance of engaging in protected activity. I point out to them that the practical significance is that the employee is immunized from employer self-help instituted against workers, in the form of discipline or discharge, or engaging in questionable conduct. Then I tell them that despite the fact that workers cannot be discharged for discipline, for engaging in a strike, they can be permanently replaced. Either this produces nervous laughter or puzzlement, and well it should.

How do you reconcile those two? You cannot be discharged as discipline for engaging in a strike, but you can lose your job.

Mr. FORTNEY. Until you added that last tag line, Mr. Chairman, I thought that perhaps the professor had accurately characterized the law. But I think an important point is that the concept of a so-called permanent replacement is a bit of a misnomer. That's the term that has been coined, but permanent replacement employees are employees that are subject to discharge for insubordination and employee misconduct just like any other employee. But with respect to the——

Mr. OBERSTAR. They're employees, to wit, who don't have the protection of a labor-management agreement. They don't have a contract.

Mr. FORTNEY. The permanent replacements work subject to the same terms and conditions that were offered to the strikers under which, in our example, the strikers declined to work. I think the important focus is that strikers that have been so-called permanently replaced retain a number of very important statutory rights. First, as a matter of law, they have a right to preferential reinstatement, either to their former job when it becomes vacant or to any other job for which they are qualified. That right continues for quite some period of time. The period is undefined, but it certainly is in excess of a year.

Second, those employees retain the right to vote. Strikers that have been so-called permanently replaced continue to be able to vote on the issues of union representation. So, there are a number of benefits. If someone were fired, they would have no employment relationship with the company.

Mr. OBERSTAR. You probably haven't been up to International Falls, Minnesota during the BE&K contract in which subcontractors that had union workers were barred from working up there. Those unionized subcontractors that did win subcontracts, and whose employees went on strike, were replaced. Those folks never found their way back onto the payroll. We could go on and on with other experiences. The fact is that the Mackay Rule simply has encouraged, in the airline industry, people like Frank Lorenzo and Carl Icahn to force a strike in order to break the union. It's just plain and simple. I've been on the business end and the receiving end. I grew up that way. My life depended on that union contract. If the employer could replace people that were on strike, you were out.

In many industries, that didn't happen. The industry would prefer to settle the dispute, bring that trained and experience workforce back on the job after settling their differences. But the fact is that the Railway Labor Act does not include procedures for the certification of a union, yet the same result can be accomplished if the employer can hire non-union, anti-union permanent replacement workers, people that don't want to be represented by unions. That's what Lorenzo did with Continental.

Mr. FORTNEY. You are correct. That is one significant difference that actually affords the union greater security under the Railway Labor Act. Under the Railway Labor Act, a union is not subject to statutory procedures for decertification such as those that exist under the National Labor Relations Act.

I have a couple of points. I have no disagreement with you, Mr. Chairman, that there have been several highly-publicized incidents in the air industry in which permanent replacements have been utilized. I don't mean to minimize that at all. What I have tried to lay out for you in remarks is that the Administration's focus is that overall there has not been a great percentage of permanent replacements used in the air industry. That does not mean to minimize the adverse effects and consequences when they have been used in those instances. I understand that and I am sensitive to those conveyance.

As I said, there certainly have been times when a particular business or employer has acted in such a way that brings support from no one. I think you have cited some of those examples for us. But I will tell you that in the last decade in the air industry there have been over 500 instances in which the National Mediation Board has mediated collective bargaining disputes. The evidence indicates that during the last decade, only about 1 percent of the disputes in the air industry have resulted in the use of permanent replacements.

Mr. OBERSTAR. That 1 percent works out to five of seven strikes in which 13,800, by my count, replacement workers went to work for unionized employees. This Chairman began his work on this subcommittee with the Eastern Airline strike. We reported what we thought was a very responsible piece of legislation to the Presidential Emergency Board, at which point I told several unions engaged, "These are dangerous waters. If we pass this bill, it's enacted, then Congress ultimately has to enact the findings of that, you folks are all going to go back to work for Frank Lorenzo. You didn't want to be there in the first place, but if you want this legislation and we get it passed that's the ultimate consequence."

They were willing to accept that. Someone has to settle this. Nobody loves a strike.

So here we are again, 2 years later, I have exceeded my time and I can't give you an opportunity to respond.

[Laughter.]

Mr. FORTNEY. I understand how that works, Mr. Chairman.

[Laughter.]

Mr. OBERSTAR. The gentleman from North Carolina?

Mr. BALLENGER. If I may, Mr. Chairman, I have some statistics here from the Air Transport Association that I think will fit very well into the discussion you two have been having.

Alaska Airlines, when they struck, 90 percent of all the mechanic strikers were offered reinstatement; the Continental strike, 95 to 100 percent of all strikers were eventually offered reinstatement; the Eastern strike, the machinists never called off the strike, so there was never any reason for rehiring; TWA, 100 percent of all the flight attendants were offered reinstatement; and in the United strike, 100 percent of all the pilots were offered reinstatement. So this I think, to a very large extent, provides the point that preferential rehire does work, and it works in general.

I would like to pose a question that—being from a right to work State in North Carolina—I'm wondering what this legislation would have on workers that decide not to join a strike. In other words, in a right to work State, you can decide whether you want to belong to the union, or you don't want to belong to a union. I think the question would come up on crossovers where individuals that decide not to strike, but have been paying the necessary dues and so forth, as is allowed. What happens to those workers in this particular area? Do they not, as I understand it, lose their seniority and are treated like replacement workers? Then all the strikers that come back obviously, at least as far as I can understand, would loop over them in seniority and other benefits. Is that not true?

Mr. FORTNEY. That is correct, Congressman. Under H.R. 5, if it were enacted, there is a risk to going on strike. There is a risk, quite frankly, for both parties if the collective bargaining reaches that point. One way in which strikers can minimize the risk that they face is to abandon the strike and return to work. These employees are sometimes called crossover employees because they crossover the picket line and go back to work.

Those employees that elect not to bear the risk of a strike and the risk of being replaced are treated, under current law, the same as those employees that are hired as permanent replacements during the strike. This means that strikers cannot come in at the end of the strike and automatically displace those employees. There would be preferential reinstatement rights that we discussed a moment ago.

Under this bill, crossovers, those that elect to exercise their statutory right not to strike, would be treated exactly the same as the striker. That is a significant change, and one that I think is very important.

Mr. BALLENGER. I have one more question. Unemployment insurance benefits that are in many States in the Nation right now bankrupt because of the recession that we're having right now. What effect would this have on the additional cost that the employer would have in unemployment benefits? I don't know whether or not anybody has even looked into the idea of this additional cost that would be created because of this.

Mr. FORTNEY. That's a very tough question. We at the Labor Department started to look into it. The unemployment system, of course, is a complicated web involving Federal as well as the 50 State systems. The difficulty in answering that question, quite frankly, Congressman, is that there is no simple answer because it requires us to closely examine each State's respective unemployment system and to closely examine the factors which trigger entitlement to benefits. We've identified several examples where there is a possibility for some increase in unemployment benefits. I cannot, however, state the effect with certainty.

Mr. BALLENGER. I yield back the balance of my time.

Mr. OBERSTAR. The gentlewoman from Missouri?

Ms. HORN Mr. Fortney, I would like to ask you to clarify something. I believe you stated a moment ago that replacement workers are hired—temporarily or permanently—to work under the same terms and conditions as those who went out on strike. I would like you to clarify that because that's certainly not my understanding of the situation when replacement workers are hired.

Mr. FORTNEY. That is my understanding, Congresswoman, that——

Ms. HORN. The same salaries and the same——

Mr. FORTNEY. The replacement workers are subject to the same terms and conditions that were offered in the employer's final offer, as far as good faith in bargaining, to the strikers. These are the same terms and conditions that the union has rejected when it elected to use an economic weapon, a strike, to try to obtain greater benefits.

When the employer hires replacements, the employer is hiring under the same terms and conditions that were offered.

Ms. HORN. I'll leave that for now because I'm not in a position to dispute that. I think we're probably both correct, but what's happening in practice is that employees with seniority who have been there for awhile, whose wages have increased, are being replaced—and perhaps this technicality that you're stating is that it is legal to do so—by workers coming in at much lower salaries. You've seen that often in the airline industry. With the Independent Federation of Flight Attendants and TWA in 1986, Eastern hired replacement pilots in Eastern that were paid $25,000 as opposed to those that have been there and given the best years of their lives and developed seniority and perhaps making greater wages.

So I think by the letter of the law, that's probably accurate. That may be accurate, but it's not the practice in effect out there in the work place.

The permanent replacement of a striker for economic purposes—tell me what would happen if subsequent to that a court decides there were unfair labor practices, and new employees are already in place, obligations to new employees have been instated by the employer. Then down the line the courts—can you tell me how that balance is affected?

Mr. FORTNEY. Let me see if I can walk you through that question. First of all, when we talk about economic strikers versus unfair labor practice strikers, those are terms that are normally used under the National Labor Relations Act.

An economic strike is a strike that is over terms and conditions of employment. Presumably they have good faith in bargaining, the parties have reached an impasse, and the union has decided to go on strike to try to prevail in its position. It is common for there to be allegations of whether the employer bargained in good faith as part of the bargaining process. Under the National Labor Relations Act, those are ultimately adjudicated by the National Labor Relations Board and are subject to judicial review.

If during that process it is determined, for example, that the employer did not bargain in good faith, the strike from the point at which the violation occurred forward is called an unfair labor practice strike. The practical consequence of that legal determination is that employees are entitled to reinstatement from that point. They get to be made whole, if you will.

If the final decision is not reached until 2 or 3 years down the road, what happens is that the strikers get put back to work, the so-called permanent replacement employees that may have been brought on are displaced of furloughed, and the strikers get full back pay and full benefits. A good example of that occurred in Colt Industries, a case where there was a protracted strike. Several years after the fact, there was an adjudicative determination of an unfair labor practice. They put all the strikers back to work, plus paid $10 million in back pay. This is of course on top of having paid the replacement workers to perform work in the interim.

Does that help you? I would be happy to give you more details.

Ms. HORN. No, that's fine. I have a basic understanding of that.

There appears right now to be a contradiction in the law. There is a practice that has changed recently. The law has not changed, but the practice over the last 10 years has changed. A worker can strike, and the law says they have a right to strike, but if they

strike, under current law they can be replaced. I think we can all say that they can be discharged or they can be fired. How would you fix that? In other words, if you don't like H.R. 5, what is the way to fix the ability of an employer to fire a striking worker, which negates the right of the worker to strike?

Mr. FORTNEY. The difficulty of that question, Congresswoman, is that it makes an assumption that I don't think is accurate. It assumes that there is something to be fixed. From the Administration's perspective, the message we're trying to deliver is that the present balance is correct. There are risks. Also both sides have economic weapons that both sides have. It's a check and balance system that is in place. I would not fix anything because in my view it is not broken and does not require fixing.

Ms. HORN. Something Mr. Chairman has said, and something I agree with him on, is that it has been recent practice that has changed and not the law. I think we all recognize that.

Thank you very much.

Mr. OBERSTAR. The gentlewoman's time has expired.

The gentleman from New York, Mr. Boehlert.

Mr. BOEHLERT. Thank you, Mr. Chairman.

I'm curious about your statement that the Administration feels under present law balance is there. Where is there balance when there is a club hanging over their head that if they decide to participate in an economic strike, they will face the very real prospect of losing their job, therefore the strike as a legitimate weapon in labor-management relations is negated? Where is there a balance?

The frustration that we face—and let me give you some time to gather your thoughts on that one—the frustration we face, quite frankly, is that most of us would prefer not to have to deal with the issue. What I want to find is balance in labor-management relations. The quicker we all wake up to the reality that if we really want to be competitive in an international marketplace we have to have harmonious labor-management relations. That's when productivity goes up; that's when everybody's a lot happier; and that's when we do a better job in the international community.

But I don't see any balance in the present setup. I think the right to strike is sacred and I think we have to preserve it. But I also think that right to strike is right out the window under the present arrangement if, when management is facing the prospect of an economic strike, they can start advertising in the local newspaper for replacement workers. If that's not intimidation, I don't know what is.

Does H.R. 5 apply to non-union jobs?

Mr. FORTNEY. Yes, I believe as drafted it applies to non-union jobs.

Mr. BOEHLERT. Then would the Administration be receptive—and I think I know the answer—to a proposal that would clarify that ambiguity and make it clear that non-union shops are not impacted by H.R. 5?

Mr. FORTNEY. Let me respond candidly. In concept, that presents the same difficulties and the same problems that I tried to describe in my testimony and in response to these questions. The issue affects the balance that exists with respect to the collective bargaining relationship. Also, if we are specifically talking about produc-

tivity and keeping this economy viable, it would not address an employers ability to continue its business in those situations in which a union has elected to strike.

Mr. BOEHLERT. Mr. Fortney, let me be equally candid in responding to you. The Administration is opposed to my proposed amendment, which I have been promoting for the past 72 hours because the official word within the Administration is that this would make the bill more palatable. They don't want to make the bill more palatable. The Administration wants every legitimate reason it can find to veto this bill. I'm trying to find something that would be sensible that would do something constructive to enhance labor-management relations rather than to divide the two into separate camps never to meet in harmony. I think that is counter to the best interests of the United States of America.

I wish you would use your considerable influence within the Administration to have them rethink their position on that.

That's all I have at this point, Mr. Chairman. I will be back many times. [Laughter.]

Mr. OBERSTAR. I thank the gentleman.

Miss Collins?

Miss COLLINS. Thank you, Mr. Chairman.

I am so pleased that H.R. 5 came to this committee so that I could have a little input.

Mr. Fortney, should we characterize the "Mackay" rule as the union busting rule?

Mr. FORTNEY. I don't think that would be an accurate characterization, Congresswoman. No.

Miss COLLINS. No? It's illegal to fire a striker.

Mr. FORTNEY. That's correct.

Miss COLLINS. A legal striker.

Mr. FORTNEY. Yes.

Miss COLLINS. What's the difference between firing a striker and permanently replacing that striker?

Mr. FORTNEY. There are several differences. First, a replaced striker has a preferential right of reinstatement. That means that they come back to the job, not as a new employee, but with their seniority and their benefits. They pick up where they were before the strike. Someone that has been fired and then rehired, presumably, would not start from that position.

Miss COLLINS. If there's a permanent replacement for that striker, you are saying that the striker can come back and take that job?

Mr. FORTNEY. That is——

Miss COLLINS. Without having their grievances settled, though. I remember you said earlier that the case with the airline pilots with Eastern—that strike was never settled, so therefore the strikers never had a right to come back to their jobs. It was never settled because permanent replacements were hired. Is that not right?

Mr. FORTNEY. Eastern is a very difficult situation, I will tell you, because it's not clear. I'm sure that some of the witnesses you will have later this morning will take the position that the use of permanent replacements put that carrier into bankruptcy. I think there were a multitude of factors that led to that truly unfortunate result.

Miss COLLINS. Are you saying that the strikers put them into bankruptcy, or the replacements?

Mr. FORTNEY. I won't characterize the testimony of——

Miss COLLINS. Or the fact that they wouldn't negotiate with the strikers.

Mr. FORTNEY. I'll let them describe that situation. The point with respect to the reinstatement of strikers is that they have a preferential right of reinstatement to their former job. This is the job they held prior to the strike, or any other job for which they are qualified.

Miss COLLINS. That is once the negotiations have been completed.

Mr. FORTNEY. That is immediately at the end of the strike. They have that right today under law.

Miss COLLINS. But you just stated in the Eastern case that the strike was never ended.

Mr. FORTNEY. But it's the union that can end the strike. By definition——

Miss COLLINS. You mean by accepting anything that management gives them?

Mr. FORTNEY. That is the union's call. That is part of the——

Miss COLLINS. You have not told me, Mr. Fortney, the difference between firing an employee, a striker, and permanently replacing that person.

Mr. FORTNEY. A permanently replaced employee has preferential rights of reinstatement. A fired employee has no such rights as a matter of law.

Mr. OBERSTAR. Would the gentlewoman yield?

There's an important point that needs clarification. Upon conclusion of the strike, or resolution of the strike, or if it sort of peters out and the union goes away, you're saying that the person that has been on strike has a right to come back to the company, but not to the former job, not necessarily to the job that person held before, but only such jobs as may open up in that company.

Mr. FORTNEY. What I'm saying is that at the conclusion of a strike, the striker has several rights. First, they can come back to their pre-strike job. If the job has been filled——

Mr. OBERSTAR. If it's been filled, he doesn't have a right to that job.

Mr. FORTNEY. Not at that time.

Mr. OBERSTAR. That's right.

Mr. FORTNEY. But at that time, at the end of the strike, the——

Mr. OBERSTAR. That's a very important distinction. [Laughter.]

Mr. FORTNEY. The striker at that time has a right to reinstatement to other jobs for which he is qualified. The striker continues to have these rights. So if the pre-strike job becomes open——

Mr. OBERSTAR. Provided the employer wants to hire.

Mr. FORTNEY. No, Mr. Chairman, this is as a matter of law today. This is not subject to the employer's willingness. These reinstatement rights I've just described to you are legally——

Mr. OBERSTAR. Enforceable in a court of law?

Mr. FORTNEY. Yes.

Mr. OBERSTAR. If there is an opening.

Mr. FORTNEY. It does not require that a job be created.

Mr. OBERSTAR. We won't pursue that.

I thank the gentlewoman for yielding.

Miss COLLINS. Thank you, Mr. Chairman.

Mr. Fortney, if all the jobs are filled, what can that employee come back to?

Mr. FORTNEY. In that context, Congresswoman, there would be the reinstatement rights to the vacancies as they arise in the future.

Miss COLLINS. It might be 10 or 15 years.

Mr. FORTNEY. But the available data shows, and it's limited, that it is not nearly that long in most situations.

Miss COLLINS. Mr. Chairman, I also remember the hardship and depravation of strikers. My dad worked on the assembly line in Detroit all of his life. It's a very hard decision for workers to go on strike. I cannot see the difference between a fired striker and a permanently replaced striker because the pocketbook issue is the same. They don't have a job.

Mr. Chairman, I have just one more question.

Mr. Fortney, there has been a dramatic increase in the use of permanent replacement workers in the last decade. Is that right?

Mr. FORTNEY. In fact, the GAO report requested by many of the sponsors of this bill would not bear that out factually. As I indicated with respect to airlines, there has been a very, very modest use—albeit highly publicized—but a very limited use of replacements in the airline industry.

Miss COLLINS. Mr. Ballenger said that there were 22 instances in the last decade of permanent replacements in the last decade. That seemed to be a great increase. I just wondered what you attributed that to.

Mr. BALLENGER. If I may finish the focus I had, the 22 in the last decade, out of 250 over the period previous to that. So in reality it's a smaller number percentage-wise than it was prior to 1980.

Miss COLLINS. All right.

Mr. FORTNEY. That's correct.

Miss COLLINS. You told me the one difference between the fired striker and the permanently replaced striker. What is the second difference. You said that there were two differences.

Mr. FORTNEY. The second difference is that the permanently replaced striker has the right to vote with respect to union matters, decertification issues, and union representation issues. Under the National Labor Relations Act, the statute provides that the right continues for 12 months after being replaced. Someone who is fired does not have that right. The Railway Labor Act provides no limit on the duration of that right to vote in union matters.

Miss COLLINS. So they can still vote, they just can't get back in.

Mr. FORTNEY. I don't know. That would depend on the terms on which the strike was settled and when it was settled.

Miss COLLINS. Thank you, Mr. Chairman.

Mr. OBERSTAR. The gentlewoman's time is expired.

Mr. Hobson.

Mr. HOBSON. I just have one question, Mr. Chairman.

It looks like to me that management says that it has to have this right to be fair, but there is a perception—rightly or wrongly—that this is becoming a tool. In certain instances, that tool has been abused in some very highly publicized situations. I don't think the

amendment is going to solve that. The amendment just shifts who is covered and who is not covered.

Is there any proposal from the Administration or anyone else that would solve the abuse of the striker replacement situation? In other words, you agree that there has been some abuses—or at least that's what I thought I heard you say. How do you get at those? That seems to be where the crux of the problem is.

Mr. FORTNEY. I am not aware of any specific amendments that have been proposed that would go to that issue. I would note, though, that the law today does require both parties to bargain in good faith. Part of that bargaining process would include, if you're hiring replacement workers, that you have to do that in good faith. That means that ordinarily you would have reached impasse with the union, made an offer that the union rejected, and as I mentioned earlier, that you're going out now and offering those same terms and conditions to others.

Essentially, it's a marketplace concept that's in play here. Keep in mind, Congressman, that the cornerstone of these laws is not to impose the substantive outcome on the parties. That is one of the fundamental core concepts underlying our labor-management laws in this country. We believe that the parties themselves are in the best position to work that out. The question is to do so in such a way that they don't commit unfair labor practices. We require that they deal with each other in good faith and we try to create some balance in the use of economic weapons through checks and counterchecks.

Mr. HOBSON. Just one other question, Mr. Chairman.

After this has been in the law for so long, why do you think there have been in the last 10 years 22 times, which is less than before—why has this become such a hot issue in this particular time frame? Why now and not 5 years ago? What has precipitated this? Was it the highly publicized issues that have come up?

Mr. FORTNEY. I think in large part it's the highly publicized issues. Organized labor certainly seems more interested in this issue now and pushing the issue harder. Then, again, the representatives will be following me as witnesses, so they may be able to answer that better. However, an objective evaluation of data indicates that there has not been a significant increase in the use of permanent replacement.

Mr. HOBSON. Thank you, Mr. Chairman.

Mr. OBERSTAR. The gentleman from the Virgin Islands, Mr. de Lugo.

Mr. DE LUGO. Thank you very much, Mr. Chairman.

Mr. Fortney, one of the basic points you've made in your testimony this morning is that the current practice for replacing striking workers does not basically weaken the right to strike, that it keeps the balance between labor and management. Of course, there has been quite a bit of talk about preferential reinstatement, and it has been pointed out by some members of the committee—you say the striker, once the strike is settled that he or she is entitled to have their old job back, or to be reinstated. In what capacity, we don't know because they're entitled to their old job if there is a vacancy, but if the vacancy doesn't exist, we're not quite sure what they're entitled to.

I have a copy of an advertisement placed by Eastern Airlines that shows just how those vacancies are filled. On July 27, 1989, about 4 months into the strike, in the European edition of the Wall Street Journal, and also in the International Herald Tribune as well, Eastern placed these ads. Let me read these excerpts.

I would like to ask unanimous consent, Mr. Chairman, that these appear in the record. These are ads that were placed in the European press.

Mr. OBERSTAR. Without objection, so ordered.

[The advertisement referred to by Mr. de Lugo follows:]

HOW TO ANSWER BOX NUMBER ADS

All replies to [illegible] should be addressed to The Wall Street Journal/Europe, [illegible] Press House, 76 [illegible] London EC4A [illegible]

THE MART

To place your classified ad, call.
Amsterdam (20) 26 36 15
Brussels (2) 513 9080
London (1) 334-0008
Frankfurt (69) 74 03 63
Milan (2) 688 7553
Geneva (22) 796 46 26
Paris (1) 42 96 96 44

POSITIONS AVAILABLE | POSITIONS AVAILABLE | POSITIONS AVAILABLE

Airline

PILOTS: THIS IS YOUR ROAD TO SUCCESS.

We're looking for exceptional men and women for immediate employment to fill permanent pilot positions to be based in Miami, Atlanta, Washington DC and New York. We are seeking qualified Captains and First Officers with exceptional talent and pride who will be a part of the most exciting story in the airline industry.

Eastern Airlines is restructuring and is one of the fastest growing airlines in the United States. We will build upon our traditional strengths of the professionalism and total commitment to the flying public. It is understood that given the current strike by IAM, ALPA and TWU, success or failure of Eastern may require you to perform the services of certain employees involved in the labor dispute. But we are confident that this can be an unprecedented time in a lifetime opportunity for growth and success.

Effective 8/1/89 Eastern plans to increase its starting salary

1st Yr. Captain—$40,000 U.S. plus bonus
1st Yr. First Officer—$27,500 U.S. plus bonus

We also offer a rapid promotional opportunity, outstanding medical retirement benefits, and immediate travel privileges. The following are minimum qualifications for applicants shall be qualified in Group II aircraft in accordance with FAA regulations or equivalent CAA or military equivalents. Candidates must have at least 2500 hours total flight experience, at least two Group II aircraft or equivalent military aircraft. First Officers must be qualified in accordance with FAA regulations and have previous experience equivalent to FAA ATP Landmark requirements. Documentation required: Candidates must speak English and possess a valid U.S. work permit and be a U.S. citizen.

Interviews will be conducted 8/8/89—8/12/89 at the

Mayfair Hotel
Stratton Street
London, England W1A2AN

Interviews will be held 7:30 am to 4:30 pm at the NEW Eastern. Send your resume to Eastern Airlines, Pilot Recruiting, International Airport, Miami, Florida 33148 U.S.A. An equal opportunity employer.

EASTERN

BUSINESS OPPORTUNITIES

HISTORIC INNS
Small chain on East Coast USA (Washington DC, Baltimore, MD Cape Cod, MA) Furnished w/mortgages. Two properties for US$ 10 Million. Reply to: The Wall Street Journal Box PO 900

BUSINESS SERVICES

LONDON OFFICE SERVICE
Business Centre at
100 New Bond Street W1
Mail, Phone, Fax, Tlx, Conf. Room
Call Tel 01-499 9192

Brussels Office Services
Exclusive address, phone, fax, telex, mailing facilities available.
Tel: 32 (2) 640.47.47/
Fax: 646.35.44.

REAL ESTATE FOR SALE

222 K SQ Commercial Property on major highway near large new shopping mall Port Huron Michigan U.S.A.

Port Huron is on the St. Lawrence Seaway. It is a gateway to Canada and is the rail & highway hub for Southeast Michigan.

Reliable from Owner, 8238 Lakeshore Road, Port Huron, Michigan 48060 U.S.A.

FOR SALE
120 acres in Arkansas, ½ mile from Interstate 40, rolling hills, 2 ponds, access to city utilities $8,000.00 per acre in 20 acre tracts.
Call (501) 674-8288,
Write HALE,
Box 1618, Van Buren,
Arkansas 72956 USA

CAPITAL WANTED

VENTURE CAPITAL NEEDED
In Nigeria to start a foundry manufacturing agricultural and industrial parts. Ferrous, non-ferrous castings and components, alloy steel forgings. Used equipment and future clients welcome.
Write Mr. D. C. Adiuby-Brown, Meltech Foundry Engineering Ltd., No. 187 Kaboga, Km.3 Bayuba Road, P.O. Box Jos, Plateau State, Nigeria, No. Africa.

AVIATION

MIDCOAST

[illegible] TT 7300 Engine SMO 100 SFRI Turbo Prop One owner Aircraft ready for delivery.
C-11 S/N 56, TT 8441 Will be delivered with fresh 5000 landing inspection. Hush kits available. Priced at $2 with Hush Kits.
U-11 S/N 68, Undergoing Paragon modification. Call For details.
U-11 S/N 78, TT since OH 1910 Each Part outfitted for part 135 Hush kits. New paint and interior.
1980 Piper Cheyenne 400 LB, on consignment, 1447 TT, engines 1447 since new. Cabin equipped.
BEECH B100 King Air S/N BA483, on consignment. Classic aircraft. Avionics widely airframe and interior recently restored to mint condition. Must be seen. Call
MIDCOAST [illegible]

1981 WESTWIND, S/N 310
267 TT, MSP, TRs, GNS IV
H) VI, Primus 40A, New PMI
1972 LEAR 25C, S/N B3
New P&I, Inreblocked 135
1972 C-90 KING AIR, S/N 580
200+ SMOKE SHOT Fresh
PAI Syr

FLIGHT INTERNATIONAL

Mr. DE LUGO. "We're looking for exceptional men and women to fill permanent pilot positions. You may be required to perform the services of or replace employees involved in the labor dispute, but also understand that this is an unprecedented once-in-a-lifetime opportunity for growth and success." That's what it states in this ad. They are talking about permanent replacement, and they're also talking about replacing a senior captain with a new captain to come in at the entrance level. That was part of the whole scheme.

This was advertised world-wide. Isn't this the same as firing an employee that is striking during a labor dispute? Isn't this illegal? Also, how can such a blatant ad as this during a strike ever lead to any kind of a settlement between management and the union?

Mr. FORTNEY. You have asked several questions. Let me see if I can take them one at a time.

Mr. DE LUGO. Go to it.

Mr. FORTNEY. With respect to the airline industry—Congressman, let me clarify some matters. I am not familiar with those advertisements. Let me answer generally, if I can, and not with respect to those specific advertisements.

One concern that I think is important for the subcommittee to keep in mind is that for an employer to replace highly skilled workers—if the decision is made to do that—such as a pilot, ordinarily takes some training. That takes a significant investment of time and resources to get a qualified pilot. I used pilots as an example, but there are also mechanics and a whole complement of employees necessary to operate an airline.

To provide the incentives for the employer to make that investment and to try to continue to operate the airline, there is a compelling need to be able to offer those employees a sense of permanence. The sense that they will not be displaced at the end of a strike. Keep in mind that throughout this process, if the union would elect to do so—again, that's within the parties' control—the strike could end and the parties could come back and reclaim those jobs. What we're talking about is how the employer should continue to operate during the strike.

Mr. DE LUGO. But, Mr. Solicitor, you know very well that we're talking about a strike here, there are negotiations going on—you're telling me that it's all on the union side and that if the unions would simply capitulate, regardless of the terms—the terms may be seen as unreasonable—that the only way they're going to secure these jobs is just capitulation and the pilots can come back and claim their jobs under conditions that they went out on strike for in the first place.

I understand various consultants have been going around the country in recent years making a living by conducting seminars for management when labor contract deadlines are approaching on how to use tools like the Mackay rule to break the union. Such methods include, among other things, the public advertising for new, permanent workers to replace striking workers. In other words, it certainly appears to be premeditated and fully the intent of management who attend these seminars to use the Mackay rule before a strike even begins.

Let me move on to another question.

Mr. OBERSTAR. The gentleman's time has expired.

Mr. DE LUGO. This was a good one. [Laughter.]

Mr. OBERSTAR. Mr. Hancock.

Mr. HANCOCK. Mr. Fortney, I'm having a little bit of a problem with the definition of labor dispute. Let's say that this is not a general strike, that there is a dispute of some type between the union and the management that involves two employees rather than the entire labor union. Would this apply in that event?

Mr. FORTNEY. Congressman, I believe the answer is that it would. The provisions of H.R. 5 which would amend the National Labor Relations Act refer to the term "labor dispute." That is a defined term under that statute and it is very broad. It goes beyond what we call a traditional strike, which is when there's a union in place and it decides to engage in an economic strike. It is very, very broad and could include any number of issues.

Mr. HANCOCK. Doesn't that answer the question that has been brought up that there isn't anything even close to a level playing field now between management and labor, or actually I think—we keep saying management and labor, but I think we ought to define it as capital and labor because without capital, the $140,000 of capital that somebody is going to get a return on, there isn't going to be a job, and there isn't going to be any labor.

I think we have a situation here of the question of retention of capital, of building of capital, and asset protection. One of the number one assets to the business community is the labor force.

Mr. FORTNEY. That's absolutely right, Congressman.

Mr. HANCOCK. Frankly, I've watched this for a good long time and there is nothing in the law that requires a person to want to take that job back either, if in fact the management or capital wants him back. Is that correct?

Mr. FORTNEY. That's absolutely correct. The law just provides a preference in the event that the striker does want to come back.

Mr. HANCOCK. But if he can find a better job, then he doesn't have to come back.

Mr. FORTNEY. That's right. Indeed, if the striker finds a better job, then that right is extinguished. It's a safety net concept to assure——

Mr. HANCOCK. So actually there is some balance there, from the standpoint of the marketplace. In fact, I have an awful lot of friends that are members of labor unions, especially in the railway area, and most of them hold stock in the company they work for. They also have a mutual effort there to retain the value of that stock because of their personal investment.

So I'm having a little problem with this thing right now to say that it's a one-way street.

Mr. FORTNEY. I would agree with you. It is not a one-way street. We believe it is a balanced playing field, which is why we are opposed to this bill.

Mr. HANCOCK. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. The gentleman from Mississippi, Mr. Parker?

Mr. PARKER. Mr. Fortney, do you believe that unions should be legal?

Mr. FORTNEY. Do I believe that unions should be legal?

Mr. PARKER. Yes, do you think we should have legalized unions?

Mr. FORTNEY. Yes, sir.

Mr. PARKER. Let me tell you where I'm coming from with that question. Unions don't support me a great deal. They don't want me to die, they just want me to stay back home in Mississippi and not come to Washington.

[Laughter.]

Mr. PARKER. So I don't approach this thing from the standpoint of unions being a big fan of mine, nor am I a big fan of theirs. But I do have some basic problems in that if we have legal unions—if unions are legal and have the right to exist—I do have a problem with replacing somebody after they go on strike. I think there have been abuses. You have stated that there have been abuses. There has to be something that can be done to stop the abuses that have occurred.

It bothers me that if somebody has a job with a company, and they've been working there for 20 or 25 years, they have a legal right to go on strike, and all of a sudden they can be replaced and lose that security. That is a tremendous bother to me.

What do you think about a company that would send a letter to someone that is on strike and say, "Either you be back at work on Monday or we're going to start hiring permanent replacements"? What is your feeling about that? What is the Administration's feeling about that?

Mr. FORTNEY. I'm not familiar with whatever specific letter you may have in mind. Certainly——

Mr. PARKER. Any letter.

Mr. FORTNEY. I would assume from what you've described, Congressman, that the employer is making the decision to try to continue its ability to operate its business.

Mr. PARKER. Can employers start hiring permanent replacements the first day of the strike? Do they have that right?

Mr. FORTNEY. If they have bargained in good faith, yes. It is possible that they could bargain in good faith and do that. Yes.

Mr. PARKER. Is it possible for an employer to say, "What I'm going to do"—he's not going to do this publicly. But let's say that he says, "What I'm going to do is to make a long-term investment. I'm going to work this thing so that I'm going to lower benefits one way or the other. I'm going to let these workers go out on strike, replace them, and I'm going to change the way I pay these benefits over a period of time." Granted, that wouldn't be in good faith, but you wouldn't necessarily have to know about it.

Mr. FORTNEY. Presumably, in the setting we're talking about, there would be a requirement that those changes be negotiated.

Mr. PARKER. No. You're negotiating. You have to have two sides to dance. You have one side that says, "I've decided I'm going to do this."

Mr. FORTNEY. Keep in mind that the law is such that if you get to a situation where you have a strike, the employer bargained in good faith, made the final offer——

Mr. PARKER. You keep talking about bargaining in good faith. I keep seeing people out there and I keep seeing companies out there that are not—they are playing this game. They tend to be making that long-term investment.

That's a bother to me. It really bothers me. There is something unfair about that. I can't get past that point, and you're looking at somebody that is not a big fan of labor. It just isn't fair. I don't like it.

If there's one thing that I think American people will stand up for, it's fairness. When you sit there and you say that people have a legal right to strike. It's legal. They can do that. The only thing that can happen is that they can be replaced. It just doesn't sit right with me. There's something unfair about that.

I don't know what the solution is. Labor is not a big thing in my State. They don't control a lot of votes. They have a lot of money, but they don't control a lot of votes. It's just not right. And your explanations are not making sense. I want to be on your side, and I'm having trouble.

Mr. FORTNEY. We're looking at a broader view of the fairness issue.

Mr. PARKER. I want to look at the fairness issue. I don't want to go to a broad view.

Mr. FORTNEY. I'm talking about fairness with respect to the overall situation. There are procedures in place that allow employees to bargain collectively if they want. That is there and is required by law. Second, it minimizes interruptions to interstate commerce. Those are the two touchstones. How do you balance the rights to do that?

In a situation which involves an airline attempting to continue its operations, part of its obligations involve a fairness concern. I don't mean to minimize the points that you're making, Congressman, but I think in a broader context there is a fairness in the system of checks and balances.

Mr. PARKER. I don't know what the ultimate solution is going to be. But it still comes down that something is wrong and that something needs to be done.

I yield back the balance of time.

Mr. OBERSTAR. The gentleman's time, in all fairness, has expired. [Laughter.]

Mr. OBERSTAR. Mr. Duncan.

Mr. DUNCAN. I have no questions at this time.

Mr. OBERSTAR. The other gentleman from Tennessee?

Mr. CLEMENT. I'll follow-up on what Mr. Parker was saying because it does come down to a fairness issue.

Do you feel, Mr. Fortney, that an individual should have the right to strike?

Mr. FORTNEY. Yes, I do, Congressman. That is one of the essential rights that an individual enjoys as part of the collective bargaining process. It has been the cornerstone of labor-management laws in this country.

Mr. CLEMENT. But if you were an employee with a company, and you knew full well that the atmosphere or environment, and that if you went on strike for any grievance that you would probably lose your job, would you strike?

Mr. FORTNEY. I don't know if I would or not. That's very hard to answer as a hypothetical. It would depend on the specific facts. I will tell you, though, again, that this is not a new right that management has suddenly gained. It is a right that has been there for

decades, for over half a century. The data that's available shows that it is a right that has been exercised throughout the 1950s, 1960s, 1970s, and certainly the 1980s.

Although there has certainly been greater attention paid to it—which I would suggest may be the reason for the concern about it—it is not something new that is being used. Indeed, the most significant Supreme Court cases that defined some of these rights arose during the 1960s. Those cases helped flush out the right to reinstatement for strikers and helped articulate how this doctrine would work. Those arose during the 1960s.

Mr. CLEMENT. Would you say that unions are stronger or weaker than there were 10 years ago?

Mr. FORTNEY. Certainly the numbers indicate that they represent a smaller percentage of the workforce.

Mr. CLEMENT. Would you say today that the middle class is being squeezed more than ever and there is a greater disparity between the so-called haves and have-nots in our society?

Mr. FORTNEY. We are currently in a difficult economic situation. We are in the midst of a recession, which hopefully will end soon. I know that it is a difficult economic time at the moment, yes.

Mr. CLEMENT. Thank you.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Mr. Geren.

Mr. GEREN. Thank you, Mr. Chairman.

Mr. Fortney, as I read the *Mackay* decision—and I don't confess to be any expert on labor law—it was not contemplated by the court at that time that a permanent replacement would really be one of the economic weapons available to management. As I read it, it was more thought to be proper in the event it was a business assessment, based on the well-accepted premise of our labor laws that business has the right to do what is necessary to keep it running during the course of the strike, recognizing that there are certain circumstances where temporary replacements may not fill the bill either because they're not available or for other reasons.

In an effort to ensure that there is just a business there for workers to go back to, in an effort to ensure that the business was not put into a position of being strangled out of existence, it said that you could hire permanent replacements.

It seems that over the course of the 50 years that we have used it, it has become part of the economic arsenal of management. Again, it doesn't seem to me that that was in the contemplation of the court at the time it made the decision. Perhaps some sort of system could be put in place where there was a presumption against hiring permanent replacement. Perhaps it's a rebuttable presumption that business could have an opportunity to overcome, or it would be a presumption that representatives of the striking workers would have an opportunity to overcome.

I would like you to comment on how you see the development of this having become a recognized management weapon and whether or not you think that's what it was intended to be, if the needs of management couldn't be met with something that is not so destructive of the management/employee relationship and didn't put such a heavy toll on the employees.

Mr. FORTNEY. Those are interesting questions and ones that we have taken some time to examine.

With respect to what was meant when these statutes were enacted and the court's decision in *Mackay,* a close review of the legislative history surrounding the Wagner Act and the subsequent amendments that have been offered to that act indicate a recognition on the part of Congress, when that law was enacted, that there could be so-called permanent replacement employees.

So the concept of it being intended as part of the economic arsenal is consistent with the statute as enacted. It certainly had been long-recognized, as I mentioned earlier, when many of the Supreme Court decisions of the 1960s, that we rely on today to deal with this issue, were decided. Of course, most recently the court addressed *Mackey* and the use of replacements in the TWA decision involving crossover employees.

So I must tell you that I do not believe that this is a new concept that has come on the scene. Moreover, the GAO report and the numbers that we have developed through the National Mediation Board records involving labor disputes under the——

Mr. GEREN. May I interrupt you for just one moment?

Mr. FORTNEY. Yes.

Mr. GEREN. I'm not suggesting that it is something that has come on the scene overnight, or even in the last decade. The statistics seem to bear out your position on that. It would seem to me that the *Mackay* decision talked about the concept of the business being able to continue to conduct its business. Implicit in that line of argument is that you can hire permanent replacements if it's necessary to conduct your business.

The way it's being used—and may have been for 30 or 40 years—it has been part of the economic arsenal. If the employees strike, they could permanently be replaced with no requirement showing that it's necessary to carry on their business. There may be a line of temporaries a mile long so that the company could carry on its business without any interruption.

There are cases, perhaps, where there are no temporaries. It would be very hard to hire temporary pilots. It seems to me that you have two different fact situations, and perhaps the law ought to be different in its application, one from the other.

Mr. FORTNEY. Conceptually, I would be concerned about trying to utilize a business necessity test. We have some experience with that under different laws, certainly under Title 7 of the 1964 Civil Rights Act and the legal concept that's implied. We know what the result has been. It often takes years to litigate the issue of what constitutes a business necessity.

That is not advantageous nor consistent with a prompt resolution of labor disputes, which is one of the touchstones and one of the objectives that we want to be sure that we meet. I would be concerned about that objective.

Maybe particular aspects could be designed that would address that issue. I haven't seen those aspects. I am not aware of any. That's an issue that concerns me.

I think another point is the concept of job security, which is really the premise of your question. Ordinarily, and throughout the act, that has been one of the chief factors the parties try to achieve

through negotiation. Keep in mind that one of the over-arching principles is that the parties negotiate over the terms and conditions of employment. This would place a heavy thumb on the scale with respect to job security and say, "You don't have to negotiate that. By legislative fiat, we will give it to you," or at least in your example there is a presumption of it.

So that, again, goes to this delicate balance that exits. It would also raise concerns in that regard.

Mr. GEREN. I assume my time is expired.

Mr. OBERSTAR. The gentleman's time has expired.

Mr. GEREN. Thank you for your response.

Mr. OBERSTAR. Mr. Payne.

Mr. PAYNE. Thank you very much, Mr. Chairman.

Mr. Fortney, thank you for your testimony. I would like to go back to something that you said very early in your testimony having to do with competitiveness. I think we're all very interested in being as competitive as possible in the global economy. My question has to do with the laws and rules that the nations with which we compete have regarding this same issue. My understanding is that the United States is one of the few industrialized nations that does not have such a law or a rule that we're talking about here today. Could you comment on that from an international perspective?

Mr. FORTNEY. Let me comment briefly, Congressman.

I am generally familiar with the assertions that this particular aspect of our labor law differs from other industrialized countries. However, if you look at the broader context, keep in mind that what we're talking about is somewhat of a silver bullet. We are taking a slice out of one aspect of our labor law, which is difficult to begin with. To make that argument, we look at other slivers of other countries labor laws.

The fact is that there are other countries—and there are a number of them, I will concede--that do have restrictions on hiring replacements that this country does not have. Those countries, however, also have vastly different presumptions regarding unions. Some of them compel unionization and do not allow the individual employee to choose. The ability to chosse is one of the cornerstones of industrial democracy in our laws. So I am very hesitant to pick up one aspect of those laws without looking at it in the total context.

Second, if you look at the economic factors such as the unemployment rates, I think you would certainly be very concerned if we had to take on the unemployment rates and the other consequences of the countries that are painted as models. Maybe they're not directly a result of that law, but I think it's a part of the overall environment and laws that would govern employment. We would need to think carefully before doing that.

Mr. PAYNE. So when you speak of putting us at a competitive disadvantage, then what is it that would do that?

Mr. FORTNEY. What would happen under H.R. 5?

Mr. PAYNE. Yes, sir.

Mr. FORTNEY. We believe it would preclude employers from maintaining their business and having an effective deterrent to the

unions economic weapon, the strike. It would preclude the ongoing operations of the business, potentially, in a number of situations.

Mr. PAYNE. All those things are true for the countries that we compete with as well. Isn't that true? It's not a competitive disadvantage.

Mr. FORTNEY. I would argue differently because there's not much of an incentive. If you can't have a meaningful response to a strike, the odds are that you will not take a strike, but capitulate to the union's demands. So you're not going to be able to respond in a market environment to those demands. You may be saddled in with wage rates that are much higher than the market would support. Those competitive consequences would be felt rather directly.

I would suggest that if you look at some of the other countries' broader economic data it would bear that out as far as unemployment, inflation, and other factors.

Mr. PAYNE. I understand that, and I understand that market aspect of that, but in terms of a competitive disadvantage, it seems to me that with the same rules that other countries are operating under—and it is in fact one that our competitors are operating under—then we couldn't say that we were putting ourselves at a disadvantage to them if we were operating under the same rules.

Mr. FORTNEY. Except that this is only one aspect. I would suggest that if we were to sit down and list all their rules governing labor-management relations, we would find that those countries' rules are fundamentally different. Take England for example, from those in our country, we would find that we would not want to adopt their rules.

Mr. PAYNE. Do you have any data on how we stack up vis-a-vis other countries from a competitive perspective as it relates to this particular aspect?

Mr. FORTNEY. I have seen some reports done by third parties, but not by the Labor Department or other agencies within the Federal Government.

Mr. PAYNE. You are privy to those? Do you have those? Could you make those available to us?

Mr. FORTNEY. Certainly.

Mr. PAYNE. Thank you very much.

Mr. Chairman, I yield back the balance of my time.

Mr. OBERSTAR. I thank the gentleman.

Mr. Hobson.

Mr. HOBSON. Thank you, Mr. Chairman.

I would just like to pick up a little bit on Mr. Payne's comment. Are you familiar with the experience in Canada? What is your view, if H.R. 5 passes, in the form that it is in now—in your view, will it increase the number of strikes, increase the duration of strikes, and have you seen any studies—I know there's a study in Canada that that could happen, and their laws are similar to ours.

Mr. FORTNEY. I have not had an opportunity to read it. I understand that study exists, but I personally have not seen it. I do understand that there are people who argue that the study makes that point. I note that the unemployment in the province in which that study was conducted is significantly higher than ours. I think it is close to 10 percent. That would concern me.

Mr. OBERSTAR. Ms. Molinari.

Ms. MOLINARI. I have no questions. Thank you, Mr. Chairman.

Mr. OBERSTAR. Thank you.

Mr. Fortney, I would just observe, in response to the remarks you made earlier about the right to replace strikers to be hired for jobs that become available. Again, as jobs for which they are qualified become available, they may not be the same job and they might not be the same time. In the Continental Airline strike, only 600 of 2,000 striking pilots have been able to get their jobs back.

Mr. FORTNEY. I have no basis to quarrel with that data, Mr. Chairman. I am not familiar with those facts, but that does point out the risk that I alluded to earlier.

Mr. OBERSTAR. A sobering thought in the balance of power in labor-management negotiations and in the strike concept.

Thank you very much for being forthright in your responses. You provided a very responsible testimony. We appreciate your presentation.

Mr. FORTNEY. Thank you, Mr. Chairman, and members of the subcommittee.

[Mr. Fortney's prepared statement appears on page 102.]

Mr. OBERSTAR. The Chair had intended to continue right on through, but a meeting has come up that I must attend for approximately a half hour and no longer than that. We will take a brief recess until 12:35. I know we have many witnesses and many members have concerns. We want to conclude this hearing in the course of today. We will resume at that point.

[Recess.]

Mr. OBERSTAR. The subcommittee will resume it's sitting.

Our next panel includes: Juliette D. Lenoir, National Vice President, Association of Flight Attendants; Captain Randolph Babbitt, President, Air Line Pilots Association; Vicki Frankovich, President, Independent Federation of Flight Attendants; George Kourpias, President, International Association of Machinists and Aerospace Workers; and George Leitz, International President, Transport Workers Union of America.

Welcome to our hearing. I'm sorry the table is so short. We ordinarily have a much longer witness table.

Ms. Lenoir, would you begin, please?

TESTIMONY OF JULIETTE D. LENOIR, NATIONAL VICE PRESIDENT, ASSOCIATION OF FLIGHT ATTENDANTS; CAPTAIN RANDOLPH BABBITT, PRESIDENT, AIR LINE PILOTS ASSOCIATION; VICKI FRANKOVICH, PRESIDENT, INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS; GEORGE KOURPIAS, PRESIDENT, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; AND GEORGE LEITZ, INTERNATIONAL PRESIDENT, TRANSPORT WORKERS UNION OF AMERICA

Ms. LENOIR. Thank you, Mr. Chairman and members of the subcommittee. Thank you for this opportunity to testify at this important hearing on H.R. 5 to prevent discrimination based on participation in labor disputes. My name is Juliette Lenoir and I am the national vice president of the Association of Flight Attendants, AFL–CIO. I am here today on behalf of the 30,000 flight attendants

we represent at 18 U.S. carriers to discuss how vitally important it is to pass H.R. 5.

Members of the subcommittee, if you had described to me in 1973, the year I started my career as a flight attendant at Allegheny Airlines—now USAir—not only what the airline industry would look like nearly 20 years later but also how airline managements would behave nearly 20 years later, I would have been skeptical and surprised. Even in my most imaginative moments, I would not have dreamed that the industry would change so much in such a short time.

Similarly, I would bet that if we could have asked the Supreme Court in 1938, when it ruled in *NLRB* v. *Mackay Radio and Telegraph Company,* whether it believed that companies would be so willing to permanently replace loyal employees in order to silence their collective voice, that it, too, would have been skeptical and surprised. In 1938, such management practices were unheard of and such action would have been viewed as unacceptable conduct by the general public.

And yet, in 1991, we are faced with a new breed of management, which is much more willing to risk destroying their company by replacing dedicated and trained workers than to work through the negotiation process to reach fair and equitable work rules and levels of compensation. This new breed of management has overloaded its corporate coffers with debt and is therefore obsessed with making money.

Workers are just replaceable commodities to them. Because of this mindset, our country languishes behind other nations in the global marketplace.

Those called to testify on this panel have experienced firsthand managements' threat of permanently replacing workers and managements making good on that threat. Those experiences have had a very adverse psychological effect on workers and union members. Senator Howard Metzenbaum succinctly expressed this point when he said, "The ability to hire permanent replacement workers has threatened the entire collective bargaining system and created undue hardship on workers and their communities. Simply put, hiring permanent replacements transforms every labor dispute into a bitter struggle for economic survival." That struggle is a struggle that the workers and their communities are doomed to lose.

Although most labor unions mark the 1981 action of former President Ronald Reagan, when he fired 12,000 striking members of the Professional Air Traffic Controllers as the contemporary beginning of the use of permanent replacement workers, the members of the Association of Flight Attendants were first threatened 5 years earlier. In 1976, our members at Alaska Airlines were forced to go on strike, then 23 days into the strike, flight attendants received the first letter from management threatening that striking flight attendants would be permanently replaced.

At the time, we believed this action would be illegal. Unfortunately, we found out that it was not. When we learned that it was legal to replace people permanently, we quickly signed a back to work agreement. While what we signed was a reasonable agreement, clearly we had been punished for striking and had to accept some less than desirable provisions.

It is also interesting for me to note that the striking pilots were also threatened with permanent replacement. Their back to work agreement with the carrier included a no strike clause. In order to secure continued employment, they had to agree to accept this clause.

The most significant effect of the threat of permanent replacement workers was that it gave the company the upper hand. Flight attendants feared losing their jobs and quickly returned to work.

That incident did not end Alaska managements' intent to use the threat of permanent replacements against its organized employees. During that same year, Alaska's management began training clerical staff, supervisors, and passenger service coordinators through FAA approved programs to qualify as flight attendants. As each contract deadline approached, more support staff was trained. It became clear that Alaska would be prepared for the next rounds of collective bargaining by having permanent replacement workers ready. Its support staff was FAA qualified and kept current.

I ask each subcommittee member how you would feel knowing that, although you could not be fired from your positions, there was a trained group of employees ready to replace you at a moments notice.

Mr. INHOFE. If you would yield on that point, that's exactly the situation every election. [Laughter.]

Ms. LENOIR. Your years of experience, training, loyalty, and dedication to your job would mean absolutely nothing. Would you constantly be watching your back? Would it be harder to fight battles? Could you remain loyal to your company? This is what the flight attendants at Alaska Airlines faced—and continue to face today as they sit down at the negotiating table—on a daily basis.

I said that Alaska's management has used this threat in successive contract negotiations from 1976 to this date. I would just like to point out one of those in July of 1984 when AFA and Alaska Airlines exchanged section 6 opening proposals.

Three months later, AFA applied for mediation, which began in December. In February of 1985, the company started to train replacement flight attendants and required them to sign a document as a condition of employment. Essentially, the document said that the flight attendant would cross any picket line and would refrain from union activity until mid-March. The company trained 125 replacement workers. During the same month, the company mailed the first of a number of letters to all flight attendants encouraging them to cross any picket line and threatening any flight attendant who did not cross the picket line and report to work with permanent replacement.

On March 4, 1985, Alaska Airlines machinists union went on strike. Separately, our members announced that they would not cross the machinists' union picket line. The following day, the airline announced it was accepting applications for permanent flight attendant positions in full page newspaper advertisements.

On March 7th, surprised by the incredible solidarity of the flight attendants, management began training 43 former Wien Airlines flight attendants and other former flight attendants in 18 hour training classes. The carrier received an FAA waiver to reduce the training to this 18 hour minimum. These trainees received pay

during training, which was previously not done, and were considered permanent employees. They were promised that they would not be furloughed, received super-seniority and were paid top wages.

The group started working a few days later, permanently replacing flight attendants not reporting to work. Replaced flight attendants were directed by management to return their uniforms and pick up their last paycheck.

I'm going to digress for a moment and point out to you the safety factor in the permanent replacement issue. As you know, flight attendants are trained safety professionals. We play a vital safety role on the aircraft. How qualified could a replacement worker be after only 18 hours of training and no experience? Some of the replacement workers had never worked as flight attendants before, while others were familiar with other aircraft beside those in the Alaska fleet. Would these new employees be able to evacuate a plane or help a sick or injured passenger? It is crucial that Congress considers the safety factor in this issue.

More replacement workers were trained and started work. On March 16th, less than 2 weeks after AFA members honored the machinists' picket line, AFA reached a tentative agreement. Included in the agreement was the first two-tiered wage scale and a back to work provision that assured that all flight attendants would return to work by May 1st on an as-needed basis. Although more junior flight attendants had to wait until as late as May 1st to return to work while the 90 replacement workers continued to fly trips, they did eventually return to work. The tentative agreement was ratified on March 18th.

It is important to note that newly trained flight attendants who did not cross the picket line during the support strike were paid substantially less as "B-scalers" than their replacement worker counterparts who were receiving "A-scale" wages. By this action management made it very clear that it would reward employees who cross the picket line and actively work against those who stood unified in support of their principles.

In closing, and with apologies to Theodore Roosevelt, I would like to say that "the things that will destroy America are prosperity at any price, safety first instead of duty first, and a love of soft living and a get rich quick theory of life. This country will not be a permanently good place for any of us to live unless it is a reasonably good place for all of us to live. Americanism is a question of spirit, conviction, and purpose not of [corporate] greed or birthplace."

On behalf of the 30,000 men and women of the Association of Flight Attendants, I urge you to support H.R. 5 and restore a level playing field to labor-management relations in this country.

Mr. OBERSTAR. Thank you very much.

Next we will hear from Captain Babbitt.

Mr. BABBITT. Thank you, Mr. Chairman and members of the subcommittee. I am Captain Randy Babbitt, president of the Air Line Pilots Association. ALPA represents 43,000 pilots at 44 airlines, and I'm very appreciative to the subcommittee for this opportunity to speak on behalf of these pilots in strong support of H.R. 5.

This legislation is needed to protect employees from being permanently replaced and losing their jobs if they are involved in a legal

strike. Of course, it's illegal to fire an employee for striking during a labor dispute, and even those who aren't especially pro-union agree with that law. However, I ask you, if an employee cannot return to his job after the end of a legal strike because someone hired during a strike has permanently replaced him, is he not just as unemployed as if he had been fired? The end result is the same, that he has no job and he has no paycheck.

A Federal law that prohibits employers from firing strikers, but the right to hire permanent replacements is the result of a judicial ruling in the *Mackay Radio* case in 1938. In the past decade, that ruling has been notoriously abused, much to the detriment of working men and women and to the balance of power in collective bargaining.

Because of the present imbalance of this power, the Nation's labor movement is under tremendous pressure. Without equity in labor-management relations, labor will be forced to continue playing on an uneven field, thus causing an even greater imbalance in our system, which relies on good faith and fair bargaining. We therefore seek legislation to prohibit the use of permanent replacements to destroy the careers of legally striking employees.

Many of you studying this legislation understand intellectually how difficult it must be for a striking employee to lose his job to a permanent replacement, but it most likely hasn't been a personal experience for you. For me, it has been. I was a pilot at Eastern Airlines for 24 years, a senior captain. I had followed in my father's footsteps, who also was a captain at Eastern Airlines. Along with 98 percent of the Eastern pilots and the Eastern flight attendants, I honored the machinists' picket line, legally called in another confrontation with Frank Lorenzo.

When our sympathy strike ended, I was not recalled. Over a year later, I still had not been recalled, even though I was number 62 on the recall list to go back to work because 800 permanent replacements with less than a year of seniority and experience had taken our jobs during the strike.

I can't describe the pain we pilots felt who had been replaced. We were well-trained, experienced pilots, whose jobs were taken from us because we had exercised our legal right to honor another union's legal strike. Our years of experience in many cases were, ironically, damaging in terms of finding new jobs at other airlines. Some airlines wouldn't even interview those over 45 years of age. Those lucky enough to get hired had to start all over again at the bottom of a seniority list at another airline. Captains with over 20 years of seniority became second officers, at a fraction of their Eastern salary, sharing training classes with young men and women just starting their careers, with no real hope of ever becoming captains again.

Over 200 of the former striking Eastern pilots served as fighter pilots in the air war in the Persian Gulf. They have very rightly been hailed as heroes. Their skill and bravery made us all proud.

At this point—my testimony here has been somewhat academic, obviously prepared and obviously well-thought out. I'm going to leave the script for just a moment because with me today is one of the members I represent. He's here actually on a short leave because from the time we took our picket line down in November of

1989 he was unable to return to work at Eastern Airlines. In August of 1990, he was called back to reserve duty. This gentleman stepped forward—a full colonel in the United States Air Force. He's been flying in the Gulf defending this country and the things that we stand for.

I would like to take a moment, if I could, and introduce Colonel Jack Gray. Jack, would you stand, please?

Unfortunately, Captain Gray, even if Eastern Airlines would have survived, was permanently replaced. So Colonel Gray and his brothers, when they come home from the conflict in the Gulf, they will be unemployed. He would be unemployed even with Eastern in existence because of the permanent replacements.

I submit that something is terribly wrong with our Nations labor law and policy when such wrongs can be legally committed and good working people punished for exercising their legal rights.

ALPA has always considered a strike to be a last-ditch weapon in labor-management relations. No employee wants to strike. It means that he gets no paycheck. It potentially hurts his company. It is the ultimate in confrontation. But in the present labor-management arena, now an employee is not just losing his paycheck, but now he is risking his career.

Why has management suddenly become so powerful and labor so threatened? Why has the strike become a weapon for management instead of labor? What has changed?

The law hasn't changed since 1938. Replacement employees have been legal since then, but until recent years employers had usually chosen to negotiate back to work agreements at the conclusion of a strike, providing that the pre-strike experienced employees replaced those hired temporarily to keep the business operating during the strike.

This changed in the airline industry in 1980 when flight attendants struck at Continental and many were permanently replaced. However, the biggest change in attitude toward strikers occurred as a result of the air traffic controllers strike of 1981, when President Reagan fired all the striking controllers and replaced them permanently.

Obviously, because of its illegality, the PATCO strike differed from those of private sector employee strikes that followed, but the example set by the Reagan Administration has emboldened management in the private sector to employ the most confrontational tactics. In this atmosphere, strikes have escalated from economic strikes over wages and working conditions to all-out ideological and economic warfare to determine whether the company or the union—or neither—will survive.

Employers have used permanent replacements not only to carry on business during a strike but also to develop non-union workforce. Frank Lorenzo's modus operandi was based upon the provocation of strikes in order to break unions. That's exactly what he did to more than a half dozen unions at Texas International, Continental, and Eastern. When the confrontation between management and labor becomes a holy war instead of a difference over economic issues, this is not a traditional economic strike, but a disaster for all involved.

The freedom to continue operations during a strike with replacements should not imply the power to grant those replacements permanent future. This flies in the face of a fundamental premise of American labor law, which seeks to provide labor with enough power to be an adequate adversary for management in order to achieve fair wages, decent working conditions, and fair treatment of employees.

Those who oppose H.R. 5 say that if permanent replacements are not permitted, more strikes would result and labor turmoil would increase, to the detriment of the public. I can unequivocally state that this would not happen in the aviation industry.

In the deregulated environment, our airlines must be competitive. Airline employees know full well that their jobs depend on the ability to compete in the marketplace. They also know that their wages and working conditions are tied to the economic health of their employers. Now more than ever, pilots and other transportation employees want to settle their differences with their employers through bargaining, rather than strike action, and our Federal statutes should promote harmony and solutions, not divisiveness and acrimony.

Pilots are cautious and risk averse by nature. After all, those are the qualities you want in a pilot. The recent pilot strikes have been the result of managements who stonewalled and maneuvered to force the workers into a strike, planning all along to use the strike as an opportunity to replace workers and drive the unions from the properties.

We believe that the elimination of the permanent replacement option, as proposed in H.R. 5, will help to stabilize the industry, not destabilize it as its detractors fear. We believe that the continued use of permanent replacements, or the threat of that use, results in conflict and confrontation and, in recent instances, chaos.

On behalf of the Nation's airline pilots, I ask that fairness and equity be reestablished between labor and management. Our industry is suffering economic woes caused in many cases by the greed of unscrupulous managements. The careers of many fine pilots and other transportation employees have already been destroyed because the law provides no protection when management seeks to punish its employees and rid itself of organized unions and their contracts. This is wrong, and this wrong must be righted.

To achieve the type of labor relations atmosphere our Nation's workers and citizens deserve and should enjoy will require a conscious tripartite commitment between labor and management and our Government. We're ready to do our part. I ask for your help.

Thank you for the opportunity to express the views of ALPA in support of this important legislation before this subcommittee.

Mr. OBERSTAR. Thank you, Captain Babbitt.

Ms. Frankovich.

Ms. FRANKOVICH. Mr. Chairman and members of the subcommittee, my name is Vicki Frankovich, president of the Independent Federation of Flight Attendants, IFFA, representing 7,500 flight attendants at Trans World Airlines. I am testifying on behalf of our unions representing 36,000 flight attendants at American, Continental, Pan Am, and TWA.

The flight attendants at Continental and TWA know painfully well the horrors and inequities caused by the hiring of permanent replacement workers during a strike. Due to my position, I will focus on the TWA case. We appreciate this opportunity to tell our story.

IFFA was forced out on strike on March 7, 1986, and during the 72-day strike that ensued, 2,800 permanent replacement workers were hired. The circumstances that brought about this conflict began in the summer of 1985 when TWA was put into play as a stock takeover target of corporate raider Carl Icahn. The ownership, and therefore the future of the airline and its 29,000 employees, was suddenly at great risk.

In less than a month TWA had selected a white knight to save us from doom. The savior was none other than infamous union busting Frank Lorenzo, fresh from Continental Airlines where he permanently replaced that workforce and abrogated union contracts using the guise of bankruptcy.

In the battle of the raiders, it was clear that regardless of the victor, TWA would have a new owner. It was also clear that whoever prevailed intended to demand substantial employee concessions to pay for the debt servicing, legal fees, greenmail, and other takeover costs.

When the dust settled, Frank Lorenzo walked away with over $40 million in greenmail; TWA paid a reported additional $20 million in legal fees, advertising, and other takeover battle costs; and the airline was saddled with millions of dollars in new debt financing.

Ultimately, Carl Icahn extracted more than an estimated $320 million from TWA employees in concessions to cover these costs. First, Mr. Icahn accepted an estimated $100 million to $110 million from the TWA pilots represent by ALPA whose total cost of labor was $368 million and whose average salary was $90,000 a year, a cut of 26 percent to 30 percent. Next, he took from IAM employees—mechanics, ramp service, dining, and commissary—whose total cost of labor was $440 million and whose average salary was $36,500, an estimated $49 million in concessions, or an 11 percent cut.

He then imposed on the management and non-contract ranks a 14 percent salary cut with an assurance that non-contract employees would not be required to take more cuts than contract employees. Finally, when dealing with flight attendants, whose total cost of labor was $285 million, with an average salary of $35,000, he demanded a concession package that he publicly estimated was worth $110 million, a 40 percent cut.

Mr. Chairman, 85 percent of the flight attendant workforce was female and more than one-third were over 40 years of age. Average service with TWA was 15 years. Carl Icahn brought an outmoded, stereotypical image of the flight attendant workforce into his negotiations with IFFA. He demanded a disproportionate share of concessions with the glib justification that "stewardesses are second incomes" and that "the girls don't need the money". When he was advised that the flight attendants, like all other workers, worked because they needed the money, he replied that anyone who could not afford the cut "should have married a rich husband" or

"should have married a pilot". That was before they had the 30 percent concession.

[Laughter.]

Ms. FRANKOVICH. Asked why a janitor who was paid about the same as a flight attendant; should be given a lesser pay cut with no change in hours or benefits, while the demand from the flight attendants was a 22 percent pay cut plus massive proposed work rule, insurance, and retirement reduction burdens, Mr. Icahn responded that "a janitor is a breadwinner, he probably has a family at home to support. You girls are second incomes."

Up to the last day of Mr. Icahn's negotiations, the $110 million flight attendant demand remained unchanged. On the last night, he made one move and that was to reduce the concession demand from $110 million to $100 million. No further compromise was forthcoming, nor has any been made up to today, 5 years later. These excessive and disproportionate demands led inevitably to a conflict and our workforce found itself with no alternative but to strike on March 6, 1986 to oppose the unilateral implementation of these terms and the probable immediate loss of up to 2,500 jobs.

Although the fight was valiant and flight attendant support was strong—with 85 percent of the workforce still honoring the picket line after 72 days—the union made an unconditional offer to return to work when it became clear that the corporate goal was the wholesale replacement of the workforce. When the strike ended, Icahn refused to reinstate strikers advising them they had been permanently replaced. During the first year after the strike, only 198 strikers were recalled to work.

It was a severe shock to all strikers but especially to the many very senior flight attendants when they found themselves without a job at the end of the strike. It was not that IFFA had failed to explain the risks involved in being on strike, but it was simply unbelievable to think that the company they had served for 15 to 25 or more years would refuse to take them back after a lawful strike. Even more shocking was the anger experienced when it became clear that, in addition to retaining the newly hired strike replacements, Icahn also intended to reward those very junior members of the workforce who had abandoned the strike and crossed the picket line by allowing them to remain in the job while the more senior employees were left on the street to await recall.

Of the 1,285 scabs who crossed the picket line—who we otherwise in this testimony politely call crossovers—who were allowed to work after the strike, 1,250 were junior to almost all of those left out of work. Strikers were clearly punished for exercising the right to strike.

The second recall of striking flight attendants began in April of 1987, 11 months after the strike ended. It ultimately took 3 years before the last striker was returned to the job. As you can well imagine, the level of animosity and hostility in the cabin between strikers and scabs was clearly evident to the passengers. The travelling public suffered, the airline suffered, and the employee suffered. All three today continue to suffer. Such an atmosphere prevents the open communication and spirit of cooperation needed to provide for the safety and service of airline passengers.

Ordinarily when a strike ends the hardships suffered by the employees, the company, and the travelling public likewise end. However, that is not the case when crossovers and permanent replacement workers are retained at the end of the strike. In our situation, the agonies lasted 3 more years with people on the street. I would advise you that they continue today in the cabin.

During the course of our 3 years out of work, single mothers with children were forced to sell their homes and move back in with parents; some lost their homes in foreclosures. In other instances, both husband and wife were flight attendants, so both incomes were lost.

By far, the most tragic case was that of flight attendant Frank Fotjik. Frank had flown for TWA for 21 years when the strike took place; he was married with two children, 8 and 9 years old. Frank's inability to regain his rightful employment and the fact that he could no longer provide for his wife and children weighed heavily on him, causing deep depression. Frank would have regained his job back at the end of the strike had the crossovers junior to him been removed and allowed to come back in their proper seniority order. Instead, 3 weeks after the strike ended, when Frank realized that he had no post strike job, he committed suicide. His widow told IFFA that Frank had no prior history of depression. Frank's death is a tremendous loss to his family, friends, and TWA. Unfortunately, this is a result of the situation we're addressing today.

IFFA filed suit to challenge the new hires permanent replacement status and force the removal of crossovers by reinstating flight attendants in seniority order. IFFA lost the crossover issue in the District Court but had the decision overturned in its favor by the U.S. Court of Appeals. The U.S. Supreme Court heard this case and in a 6-3 decision issued in 1989 ruled that, after a strike had ended, employers could retain crossovers in preference to more senior full-term strikers.

IFFA lost the issue of hiring permanent replacements in the District Court and the U.S. Court of Appeals and the U.S. Supreme Court refused to hear the case.

We clearly feel that the courts have made a mockery of Federal statutes regulating and promoting collective bargaining. Congress has specifically protected the right to strike and has specifically prohibited employee discrimination based upon the exercise of that right. It is unlawful, Congress has said, for an employer to discharge or otherwise discriminate against an employee because that employee exercised the right to strike. As illustrated by the IFFA-TWA post-strike litigation, the Federal courts have, under the guise of interpretation, effectively repealed these statutes. The courts have in effect said: "We read that Congress has prohibited an employer from discharging or otherwise discriminating against an employee who exercised the right to strike, but we will allow that employer to permanently replace any employee who exercises that right."

With all due respect, this is a distinction without a difference because permanent replacement is, by any definition, tantamount to discharge and is clear discrimination on the basis of who did, and who did not, work during a strike.

Similarly employees who are union members, who participate in the collective decision to exercise the right to strike, who commence that strike, but who thereafter cross a picket line and return to work, may be rewarded by any employer by being retained in preference to those employees—including far more senior employees—who stayed on strike for its duration.

Again, with all due respect, this is judicial approval of the notion that benefits, including jobs, can be doled out on the basis of the extent of protected union activity. Such discrimination is contrary to Federal labor policy. If it had not been up to this point, it certainly should be from now on.

After a 96 percent favorable strike vote, thousands of TWA flight attendants relied on the mutual commitment that we all gave each other when we voted to strike. We relied on that commitment when we all commenced the strike, and we relied on a Federal labor policy that prohibited discrimination because of the exercise of that right to strike and the doling out of benefits on the basis of who did, and who did not, exercise what we thought to be a protected right.

We suffered greatly for exercising our right to strike. We are willing to accept the suffering that you must face during the course of a strike. We should not be forced to continue to face those consequences after the conclusion of a strike. A union member risks enough by exercising the legal right to strike without also facing permanent replacement. We do not have a level playing field. We seek a level playing field. There is no balance, and we seek balance.

I thank you for this opportunity to speak on behalf of an issue very dear to me and to airline employees everywhere. The Continental and later the Eastern Airlines situation, and massive permanent replacements that occurred elsewhere, point out that ours is in no way an isolated instance in the airline industry. I urge members of the subcommittee to support H.R. 5. I will be happy to answer any of your questions.

Mr. OBERSTAR. Thank you for that insight into one of aviation's most beloved figures, Mr. Icahn.

[Laughter.]

Mr. OBERSTAR. It occurred to me while you were testifying that he and Ivana Trump ought to get together, that way he would get a rich divorcee and second income, which he obviously needs.

[Laughter.]

Mr. OBERSTAR. Mr. Leitz.

Mr. LEITZ. Thank you, Mr. Chairman and members of the subcommittee.

Good afternoon. My name is George Leitz and I am the international president of the Transport Workers Union of America. I am testifying today on behalf of the 50,000 members of our Air Transport Division in favor of H.R. 5. Like my brothers and sisters in the Air Line Pilots Association and the Internal Association of Machinists, I only wish this legislation had been considered and passed before the tragic confrontation at Eastern, a catastrophe I strongly believe would have been averted if the company had not been afforded the option of permanently replacing its striking employees.

The key principle of the Railway Labor Act, the law that governs labor relations in the airline industry, is that both management and labor are obliged to make every reasonable effort make and maintain agreements. The basic question before Congress is whether resort to permanent replacements by an employer facilitates or undermines the making and maintaining of agreements between parties in a labor dispute. Logic and experience tell me that permanent replacements of strikers inevitably turns a disagreement over wages and working conditions into a destructive and bitter struggle for survival.

In my own experience, strikes are difficult and emotional situations. However, whatever frustration and anger I may feel at the tactics or bargaining stance of an employer is tempered by my recognition that I cannot achieve the aspirations of my membership for a better life if I conduct bargaining or a strike in a fashion designed to destroy the company.

Unfortunately, because it has the legal option of permanently replacing striking workers, a company may conduct bargaining in a manner designed to provoke a strike in order to give it the opportunity to rid itself of a union. In my view, the managements of Eastern, Greyhound, and the New York Daily News all bargained with the destruction of the union as their chief aim and the fact that the law allows for this opportunity eliminated all possibility of compromise. This was clearly a significant factor in creating the totally destructive bargaining environments that led to the bitter strikes at these companies.

To be sure, sometimes the employer miscalculates and ends up destroying itself in the process of destroying its unions, as was clearly the case with Eastern. Unfortunately, I have little confidence that the management community has learned much from the Eastern tragedy, particularly given the vehemence with which they are fighting to preserve this economic weapon.

The position of corporate America, as well as the Bush Administration, on this issue is all the more troubling in that permanent replacement of strikers represents the exact opposite of the direction in which we must travel if labor and management are to form new cooperative relationships to deal with threats posed by foreign competition.

I have been told by three consecutive Secretaries of Labor, as well as by many CEOs, that the old autocratic adversarial system of labor relations must give way to a new systems, one that stresses common interests and cooperative endeavor. Indeed, the TWA has sought to negotiate for greater worker autonomy and authority a means for establishing cooperation.

However, it is difficult for me to believe that either the management community or the Administration is serious about these goals when they insist on perpetuation of the right to permanently replace workers exercising their legal right to withhold labor. Permanent replacement of workers is the ultimate in adversarial labor relations. If we are ever to move toward a more progressive, constructive system of industrial relations, elimination of the right to permanently replace striking workers must be one of the first reforms.

Thank you very much.

Mr. OBERSTAR. Thank you very much, Mr. Leitz. I appreciate your thoughts and your insights.

Now batting in the cleanup position, a frequent witness before this committee, George Kourpias.

Mr. KOURPIAS. Thank you very much.

Mr. Chairman and members of the committee, my name is George Kourpias and I am president of the International Association of Machinists and Aerospace Workers. We represent more than 100,000 men and women whose collective bargaining agreements are governed by the Railway Labor Act. On behalf of these employees of airlines, rail carriers, and our members in related industries, I want to express my appreciation for this opportunity to discuss with you this critical issue of permanent replacement of striking workers.

The use of permanent strike replacements is a horror story that has been blotting the pages of U.S. history for the past 10 years. We have to go back in time no farther than the Eastern Airlines tragedy to view that record of shame. Mr. Chairman, I can tell this committee that if it were not for the use of permanent strike replacements, Eastern Airlines would be flying today.

I shall skip over the human misery that the Eastern tragedy brought down on tens of thousands of human beings. Among my own members, there have been numerous suicides and fatal illnesses. Among these victims there have been broken families, broken bodies, and broken spirits. There have been deaths and serious illnesses caused by increases in alcohol and other drug addiction, deaths attributed to coronary, high blood pressure, and other emotionally caused illnesses. Furthermore, there has been industrial chaos. Workplace democracy was replaced by corporate anarchy.

A moment ago, I stated that Eastern Airlines would be flying today, if it were not for the issue of permanent strike replacements. It was that issue, and that issue alone, that brought down this carrier that had been operating since 1928, some 62 years.

The critical time in the Eastern tragedy came more than a year ago, after Martin Shugrue was appointed by the court to operate Eastern as a trustee. We invited and we urged Mr. Shugrue to resume negotiations. I met personally with him, as did our union's vice president in charge of transportation, John Peterpaul.

Our purpose in those meetings was to try and end the strike, to try and save Eastern Airlines. We thought that the unions and Mr. Shugrue could negotiate a settlement. Mr. Shugrue indicated that this was his wish as well. However, he told me in our talk that he would not resolve the issue of the permanent replacements. Without settling that issue, there could be no settlement. If that issue could have been resolved, the other issues then would have fallen into place. The provisions of the Railway Labor Act would have worked, as they historically have.

Mr. Chairman, the industrial anarchy I referred to a moment ago continues today. I predict it will get worse. The situation today on Alaska Airlines is an example of that type of anarchy. Alaska Airlines is a perfect example of a split workforce. It is now made up of the permanent strike replacements, as well as some strikers, those few who have been able finally to return to work. Now you have strikers and their replacements working side by side. You

have a partially unionized workforce and you have litigation beyond description. You have a real life experiment on how the spirit of the Railway Labor Act is being mocked by a judicial loophole.

Every carrier should be operating for profit, of course, but they also should be operating for the safety and convenience of the travelling public. How can this latter purpose be accomplished with a divided workforce, riddled as it is with morale problems and internal dissent? All this is because of this judicial loophole.

The loophole to which I refer is the judicially-created *Labor Board* v. *Mackay Company* decision. Under this doctrine, even though it is unlawful for an employer to discharge his employees for engaging in a lawful economic strike, it is lawful for the employee to be permanently replaced. Truly, this doctrine would stagger the imagination of a George Orwell.

In summary, *Mackay* doctrine goes against the Federal labor policy's most basic principle. It approves of harsh injustices against working men and women when they exercise their right to engage in concerted and protected union activity. This doctrine does violence to the healthy relationship between management and labor, and sickens the otherwise healthy concept of collective bargaining relationships. I do not think I am exaggerating when I say that that doctrine threatens the very foundation of free collective bargaining in America.

As the testimony of my fellow union representatives notes, over the past decade there have been unbelievable increases in employer irresponsibility. More and more employers are now viewing collective bargaining in a new light. Now they see it, not as a means of renegotiating wages and working conditions, but as a means of overriding their employees' free choice. They see it as an opportunity to recruit a new workforce of permanent replacements not likely to push for union representation.

So, employers may now change a dispute over a union contract into a battle over the future of a union, and indeed over the future of unionized employees. When they do that they are doing more than trampling on the Railway Labor Act. They are also punishing—often permanently—their employees for doing what the Federal labor laws say they may do. This certainly was not and is not now the intent of the Railway Labor Act, or the National Labor Relations Act.

Federal labor policy historically takes into account the fact that an economic strike has limited objectives. It puts only limited economic pressure on employers. Such work stoppages are temporary. Yet, under the *Mackay* doctrine, the employer's solution is made permanent. While employees are seeking the short-term goal of improving their livelihoods, employers are given the opportunity to destroy the other party totally.

Clearly, the present situation cannot continue. Or it can continue, and hostility will beget hostility. It can continue and national labor policy can continue to be held up to ridicule, perverted by the unscrupulous and misused by the unethical.

Mr. Chairman, I know that the responsible element, the majority of this Nation, both management and labor, do not want to see this continued irresponsible perversion of national labor relations. That

is why we are testifying today in support H.R. 5. H.R. 5 is not an earth-shaking bill. It does nothing new or innovative. It merely restores the intent of national labor policy as spelled out by both the Railway Labor Act and the National Labor Relations Act. Its purpose is solely to correct the imbalance of power caused by that doctrine.

Mr. Chairman, we seek no special advantage. We seek only a level playing field. We seek only a return to the historic function of our Nation's labor laws. We seek a return to collective bargaining within the constraints and protections of those laws.

Thank you very much.

Mr. OBERSTAR. Thank you very much, Mr. Kourpias, for a very comprehensive review and very useful insight into the Eastern situation. You described it very, very well.

At this time, the Chair recognizes the gentleman from North Carolina, Mr. Ballenger.

Mr. BALLENGER. Thank you, Mr. Chairman.

I apologize to the panel members for not having been here for the whole presentation and for having to run again after this. But a couple of points I would like to bring out—as I remember it—first of all, I would like to say that as a businessman myself, I wish that people like Frank Lorenzo and Carl Icahn never existed because I'm sure that without the publicity they've created maybe we would never have this bill. But as a businessman, I cannot look forward to the passage of this bill.

Somewhere along the line, we have left out the beginning of the dispute between the machinists and Eastern Airlines. As I remember it, Frank Borman tried for years to work out the situation—and I know the airline pilots and the flight attendants didn't strike, but it was the machinists—and they produced in Eastern Airlines a money loser that was having real problems of continuing to exist. I don't know whether it was because people didn't like Borman, or because people didn't like the head of the machinists union at that time. I think they both had difficulty accepting the problems.

So my understanding of the situation was that the only way out for Eastern Airlines was to sell to somebody—anybody that would be willing to buy it. So—he's no friend of mine—Frank Lorenzo came along. Through efforts of the union itself, they forced Eastern Airlines to sell to Frank Lorenzo and at the same time knowing what a difficult individual he was, the only way he figured he could make money out of this was to break the unions. I understand he may have used some kind of illegal methods. He used the bankruptcy laws and everything else available to a businessperson and this should not be allowed.

But the point is that the two airlines about which we speak, Eastern and Trans World—I've always heard that Trans World had the worst labor policy of any airline in the country and that it would never be able to make any money because of the situation that the previous management had allowed to occur in that airline—and this was before all this started.

I think the fact that when the chips were all down and Eastern finally had Mr. Shugrue, who was trying to do his best to straighten it out, the decision was finally made to shut Eastern Airlines

down. I think it was made by the machinists that would not accept—I think the pilots and the flight attendants accepted the likelihood of changing something. The machinists decided they would not allow it, so Eastern shut down.

I see some heads shaking, so I'm probably wrong. But you have to accept the fact that I'm biased.

[Laughter.]

Mr. BALLENGER. Some of you folks have seen me before, so it's not really a shock to you.

Mr. KOURPIAS. Are you asking that as a question or a comment?

Mr. BALLENGER. No, I have to run.

Mr. KOURPIAS. First of all, it wasn't because of the unions, for we did not force Borman to sell to Frank Lorenzo. That's a management decision that was made by the Board of Directors and by Borman.

Mr. BALLENGER. But the reason for that was because they were going down the tubes and they had to do something.

Mr. KOURPIAS. I'm not so sure they were going down the tubes. It was a matter of them coming to the collective bargaining table and negotiating an agreement.

Mr. BALLENGER. I don't want to cut you off, and you can say it after I leave, but I do have to run.

I would like to add one thing. Everybody has been discussing all day long the difference between a fired and replaced worker. I have a legal definition where when you're fired the only benefits you have are unemployment compensation, in certain circumstances in certain States, and voluntary health insurance under COBRA. If you're replaced, you get preferential reinstatement—there are a list of 10. I don't want to waste your time and everybody's by reading them all, but may I have that put into the record?

Mr. OBERSTAR. If the gentleman wishes to include that in the record, without objection, the definitions will be included in the record at this point.

[The referenced definitions provided by Mr. Ballenger follow:]

THOMPSON, MANN & HUTSON ISSUE PAPER

FIRED VS. REPLACED
A WORLD OF DIFFERENCE

Proponents of the "Strike Bill," H.R.5/S.55, assert that current law provides permanently replaced strikers with little or no protections. In the world they seek to portray, being **replaced** is a euphemism for being **fired**, the two are the same and facts to the contrary are "legal mumbo-jumbo."

It should be noted that not all strikers are subject to permanent replacement. Workers who strike due to an employer's unfair labor practices are entitled to full and automatic reinstatement to their jobs following the strike. Replacement workers must be let go to make room for the returning strikers.

Only in economic strikes, where strikers voluntarily walk off the job to demand increased wages or other terms and conditions of employment, are replacement workers hired for permanent positions. Economic strikers are not entitled to automatic reinstatement following the strike. They are, however, guaranteed significant preferential re-employment rights and benefits not accorded fired workers. There is, in fact, a world of difference.

Compare, for example, the following rights of workers who are fired with the rights guaranteed to economic strikers who are permanently replaced:

FIRED

1. Unemployment compensation . . . in certain circumstances . . . in certain states.
2. Voluntary health insurance coverage through COBRA in most cases.

REPLACED

1. Preferential reinstatement upon vacancies with the struck employer to the same or a substantially equivalent position.
2. Options to accept or refuse any job with the struck employer or another employer for which the worker is qualified without waiving rights to the worker's original position.
3. Lifetime reinstatement rights with the struck employer based upon two preconditions: a) continued existence of the company or a successor, and b) the worker wants a job.
4. No new hires by the struck employer until the preferential recall list is exhausted.
5. Continued accrual of seniority with the struck employer.
6. Preference over permanent replacements for recall from indefinite layoff.
7. Continuation on the employer's preferential recall list even if the worker is fired from a lesser job for incompetence.
8. Right to vote on all questions affecting the bargaining unit (such as ratification of contract terms) for a full year after replacement. While considering the issue of permanent replacements, Congress in 1959 expressly created this right, rather than discard a decades-old balance in labor-management relations.
9. Unemployment compensation in virtually all circumstances.
10. Voluntary health insurance coverage through COBRA in all cases.

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Mr. BALLENGER. Mr. Babbitt, one thing that bothered me—and I'm a manager of a plant that has 200 employees—your statement that the people that oppose H.R. 5 say that if permanent replacements are not permitted more strikes will result and labor turmoil would increase to the detriment of the public. You say that you can unequivocally state that this would not happen in the aviation industry.

But having been a manager, I recognize this law changes the whole work situation. Under H.R. 5 any two employees that disagree with my management philosophy or whatever I do can strike. It doesn't take but two. There are all kinds of issues that can come up because two people disagree with the labor philosophy of that particular entity—whichever airline you want. Under H.R. 5 there is a greater likelihood of more strikes coming up, because there is no penalty—absolutely none against striking workers. There is no penalty at all for strikes if this bill passes. I can see that you're going to have unlimited amounts of striking just over nitpicking stuff that normally would never occur.

I hate to run on you all. You all can chew me up after I leave, if you will, but I must run——

[Laughter.]

Mr. BABBITT. Do permit me at least the observation that the testimony was based on an observation—remember we collectively bargained from 1938 to date. Our track record over that period of time is what it is based on. We have a lot of facts to support that.

I think one point we may have overlooked here is our intent. All the laws that govern collective bargaining in this country are designed to deal with conflict. You have described the very conflict. All we want to be assured is that when those conflicts do result that we have a tripartite process that we can all agree to in order to solve those conflicts, and if at the end of that conflict we don't have a resolution, at least the worker is on a level playing field with the management. That's all we ask for.

Mr. BALLENGER. You and I will probably disagree, but I would say that I think we're taking a tripartite process and making it dual to be between the unions and the government as to what comes out of it, and management will lose if this bill passes. That's a completely unbiased statement, and I have to run.

[Laughter.]

Mr. OBERSTAR. In fairness to the panel, the questions the gentleman asked would take the rest of the afternoon to answer.

[Laughter.]

Mr. OBERSTAR. Perhaps you would like to summarize your views in response.

Mr. LEITZ. Mr. Chairman, I would just like to say—the Congressman mentioned that there was no penalty involved. There was a very great penalty because the flight attendants returned to work after 11 months. Out of 6,500 flight attendants on Eastern Airlines, only 2,000 returned to work and 4,500 were still out. When the company went out of business, all those flight attendants were never recalled to work, so that was a permanent—whatever you want to call it—replacement, discharge, or whatever. So there was a great penalty. Only two States paid unemployment benefits. There is no great benefit in having a strike.

Mr. OBERSTAR. The opposing view to this legislation will try to characterize the legislation, as has been done in the course of the hearing today, as tilting the balance toward labor or saying that it removes any penalty for a strike if enacted and signed into law.

In fact, that's simply not the case. As I observed at the outset, I think what this legislation will do is to reestablish the balance that existed prior to the court decision in 1938 and rectify 200 years of wrong management dominance during the preceding two centuries of the industrial revolution.

Mr. Fortney earlier suggested that unions with this tool could say to workers, "Join the union. We'll protect your jobs forever." That's simply not the case. Workers had little, if any, protection before the Wagner Act. They were replaceable at will. With the Wagner Act and with the subsequent legislation there was some major protection. There was an equilibrium established. The multi-billion power of the corporation could no longer be wielded against the individual standing alone, unprotected, and unarmed against the power of the corporation.

Now joining with fellow employees they can bargain collectively, but even then people are at risk. Anyone who thinks that your job is protected forever, as Mr. Fortney said, just because you're a member of the union ought to come from Northern Minnesota in the iron ore mining region and see how many people have been out of work that are members of the union.

I happen to remember the days of the poll watchers. The company placed poll watchers at the election voting places before the days of the Massachusetts ballot and threatened people the next day. "You voted. You took a Democratic ballot. You better vote right next time or you won't have a job." Where was the balance of power then? Then you had the company stooges in the library watching to see who took out what books. If they took out the wrong books, they were called subversives and they were fired.

In the pool hall, who said what? What conversations were carried on? That was the wrong balance of power. It was tilted in the wrong direction.

I don't think that this legislation is going to revolutionize the world. I do think it brings management and labor closer into balance.

I would like to question whether airlines used rights under the *Mackay* rule to hire replacements for the decades of the 1980s and why, in your judgment, that practice was so accelerated during the 1980s.

Mr. BABBITT. In the years prior to deregulation, we had operators who were more interested in operating airlines. I think the change came in the early 1980s with the invitation to replace employees with permanent replacements. I think that was driven by people who were more interested in manipulating assets than in running an airline. These people have no background in the airline industry—their background is finance, and they're only concerned with one item, the bottom line.

Also, if you will permit, I can't let one other observation go unchallenged, with all deference to Mr. Ballenger's absence. He indicated that the pilots and machinists had in fact agreed with Eastern Airlines. We had not in fact agreed.

In response to the suggestion that passing this law would shift the balance so that labor and government would be able to join together and somehow tilt this playing field, I would take you back to the beginning of the Eastern strike where the machinists agreed to submit all open issues to binding arbitration, allowing an outsider to come in—the pilots and flight attendants agreed to that as well. All three unions were willing to submit, to arbitration and for the first time in my recollection of the Railway Labor Act, in 34 different cases in which the NMB had recommended to the President of the United States that the Presidential Emergency Board be invoked, the President saw fit to disregard that suggestion and allowed that strike to proceed.

So if there was an imbalance, if there was someone's thumb on the scale in that conflict, I believe it was the Government's thumb.

Ms. LENOIR. I would just like to suggest, Mr. Chairman, that in 1976, as I said earlier, at Alaska Airlines, we saw the inspector for the first time on permanent replacement workers during our 23-day strike. With each contract that we have negotiated at Alaska since that time—there have been 6 of them—and we are currently at the bargaining table with Alaska management even as I speak. With each successive negotiation, Alaska management has trained other workers to replace their flight attendant workforce if a strike should occur.

So the balance of power is clearly on the side of management. The union's ability to negotiate a fair and equitable agreement for the workers they represent—they clearly have their back to the wall walking into the negotiations process—is significantly diminished walking in the door, we have our backs to the wall already.

The process continues, and has been exacerbated, as my colleagues have said, since the air traffic controllers' strike and they were replaced in 1981.

Mr. KOURPIAS. Let me also add, Congressman, that one of the biggest strikes in the air transport industry was in 1966 in which the entire industry was shut down except American Airlines. *Mackay* doctrine was in effect, permanent replacements were not the issue of the strike, and the strike was finally settled. But the difference, as the Captain so ably said, was the fact that today the airlines are not being run by people that want to see success in the airlines. They are run by greed. That was not the case in the 1960s. We had a resolution to that dispute.

Mr. OBERSTAR. There was another factor at work in the era pre-1977, a tool management held called an airline mutual aid pact. Before the mutual aid pact, strikes averaged 85 days, maybe 100 days—my recollection is not perfect on that score—in which one airline in which workers were on strike received payments from the other carriers. Of course, without the pressure, the airline would continue to do very well financially. In fact, Northwest Airlines, on a 108-day strike made $109 million in payments from other carriers that rebated to Northwest money that they got from carrying Northwest's passengers.

When Congress terminated the airlines mutual aid pact, the average strike dropped to something like 20 days. The balance of power seems to be quite equitable.

There will be other issues raised when we get into markup, and we can just anticipate them, such as the secondary boycotts. What role does the secondary boycott have in an airline strike and what kind of strike does this create for the labor-management relationship?

Ms. FRANKOVICH. Secondary boycotts are illegal under the Railway Labor Act, so they shouldn't be at issue in this question at all.

Mr. KOURPIAS. The courts took good care of that.

Mr. OBERSTAR. The question of violence on the picket lines—every time labor-management issues come up there is a question of violence on the picket lines or intimidation such as talking to people that cross the picket lines.

Mr. KOURPIAS. In situations where people are crossing the picket lines, violence is provoked. Many times the public looks at the striker and says, "It's their fault." But you have to look deeper into it. What provokes violence at times? A lot of times, permanent replacements might provoke it. It's something that we have to look at. It's not just the striker that creates the violence or provokes it.

Ms. FRANKOVICH. I would agree with my brother on this issue. What could be more provocative than the issue that someone is permanently stealing your job? What could be more provocative than having armed guards, which the corporations—not unlike days of old—do more and more often? In the flight attendants strike at TWA, we had two different groups of armed guards at each one of the airports to protect the airlines against damage that might be created by flight attendants. There was no violence, but the provocation came from the corporate side and not from the union side.

Mr. OBERSTAR. But isn't the remedy for that already existent in law? If there is violence, there are laws to deal with violence and it is treated with the appropriate legal remedies, right?

Ms. LENOIR. It is like any other violence. We live in this country, unfortunately, in a climate of violence. If me yelling at you for crossing my picket line is something that people equate to violent behavior, then I would personally rather have that action labeled as violence than something a bit more forceful.

Mr. OBERSTAR. Thank you.

Our ATA witness says, "The right to operate and to replace strikers is the only effective counterweight available to a carrier should his employees decide to withhold their labor services." Is that the only remedy?

Ms. LENOIR. I would submit to the person that is going to be testifying on behalf the Air Transport Association that from our perspective, the strike is a failure. It's a failure in the process of negotiating. The ultimate end of negotiations is a fair and equitable agreement for the employees and for the employer. Anything short of that is a failure of the process.

It occurs to me that strikes occur when there is no choice, when the process has failed. To exercise management's right to replace workers permanently is management's failure. If I approach the bargaining table with the mindset of coming out with an agreement, that's what we both should be focusing on, to come out of that process with an agreement, not a strike, and not replacement workers.

Mr. OBERSTAR. Thank you.

Mr. FRANKOVICH. I think quite clearly the corporate option is to operate during the strike. That is what they have. The *Mackay* doctrine has been largely abused because it was not a doctrine created for the purpose of allowing management a tool of permanently annihilating the workforce and attempting to permanently annihilate the union. On the contrary, it was to address the question of whether or not it was essential during the strike to offer permanency. The doctrine was during the strike, not perpetuating the problems beyond that case.

The doctrine of necessity during the strike—for example, in our case, Carl Icahn announced well before the strike, in discussions with the union negotiating team, that there were 4,000 people lined up on the street waiting to take our jobs. He said, "Look out that window. See that woman on the street? That's a stewardess. I can get her in here today."

I would suggest to you that there is no doctrine of necessity in our case, and probably in many, many other cases that you could cite from people here at this table today that required, as a condition of being able to operate during that strike—which is the corporate weapon that they needed to offer permanency to people—I would suggest that today in the strike in New York that the Daily News, where they have three people doing the job of distributing the newspapers—they didn't need to offer them permanent employment to get them to take those jobs.

I think you miss the point of what *Mackay* is all about by granting that it should be an acceptable corporate tool. I don't think was that intent at all.

Mr. OBERSTAR. You raised a point that I wanted to bring up, that H.R. 5 will not prohibit an airline from operating during a strike and resuming operations. They can continue to operate, they can still hire temporary employees. They can use management or their non-union personnel to fill the jobs of those that are on strike. In fact, in many companies management people move in to fill the jobs vacated by strikers.

To what extent can a carrier operate during a strike without hiring permanent replacements? Daily News in delivering newspapers by using street people is not quite the comparison on the point.

Mr. BABBITT. Without laying forth a blueprint on how to replace myself——

[Laughter.]

Mr. OBERSTAR. Management is pretty imaginative in doing that on their own.

[Laughter.]

Mr. BABBITT. Rather than reading into the record the precise steps, let me just reflect back. If you go back in airline history since 1938, many, many times airlines have operated during a strike with temporary replacements, sometimes more successfully than others. But the one question that is so critical as all of us contribute to what hopefully will become good legislation—will it improve labor relations? I think that's the goal we all share here, to find a just way to do our labor relations to make sure that we have a fair balance.

I should pause for a second and let the record reflect that we have seen some changes that did balance it. Mr. Chairman, if I'm not mistaken, you authored the amendment on the floor in 1978 that made the mutual aid pact illegal. We testified strongly that the mutual aid pact created an imbalance. I would like to thank you on behalf of my members for that legislation.

We do need constant reviews and adjustments. It is our view that this is one that gives us an opportunity to have a more balanced playing field. We have seen a change in attitude, we've seen people abuse that loophole, if you would, and take advantage of the situation. All we're suggesting in H.R. 5 is that we go back to a more balanced playing field and make sure that that scale has nobody's thumb on it.

Mr. LEITZ. I would also like to mention that Mr. Fortney mentioned other procedures, such as if an employer deals unfairly at the bargaining table that you can file for unfair labor practices. There is no such thing under the Railway Labor Act. Under the NLRB you can do that.

In the Greyhound strike, they did do that. The union won that. They were awarded some $32 million or something better than that, but they have never paid it. The law goes on and the strike goes on. The people are still out on the streets. So the courts don't resolve anything. The law has to change.

Mr. OBERSTAR. Mr. Duncan?

Mr. DUNCAN. I don't have many questions. I apologize that I was unable to be here to hear your testimony, but I will ask just a few questions.

Is there anything in this legislation that would keep an employer—if he or she wanted to—from hiring temporary replacements and actually making them be permanent? In other words, just making a private decision that they're not going to settle the strike—if it just dragged out for 2 or 3 years to just keep using these temporary replacements. Do you understand what I'm saying?

Ms. FRANKOVICH. I think if the union ended the strike—if I understand this legislation, the union ends the strike and the jobs go back to the employees that were in the jobs prior to the strike. If the corporation then wanted to hire new employees, and they wanted to hire the permanent replacements as new employees after they had returned the other employees to work, I believe this legislation would allow it. It would not allow the company to perpetuate a strike once the union ended the strike.

Mr. DUNCAN. What I'm getting at is that there are no time limits under this legislation, right?

Ms. FRANKOVICH. Right.

Mr. DUNCAN. So if an employer—let's make something specific. Let's say that employees were being paid $10 an hour and they wanted $15 and an employer just made the decision that he was not going to give them one penney more. Even if the strike goes on for 5 years, he would just use these temporary employees for 5 years. What you're saying is that the only way then would be for the union just to give in totally and completely and come back. There is nothing in this law that effects that one way or the other. Is that correct?

Well, let me ask this—I'll tell you this first. I probably have the most open mind, or one of the most, on this particular legislation of anybody in the Congress. On many things, I come in here with my mind made up, just like everybody else, but on this, I'm not sure. So I have decided to listen to both sides as much as I possibly can and make some decision.

Counsel has just handed me some information that says that in most of these major strikes, as far as they relate to the airline industry, that after a short period of time or at the end of the strike, in the last airline strike 90 percent of all the strikers were offered their jobs back; in the Continental strike 95 percent to 100 percent of all strikers were eventually offered reinstatement; TWA 100 percent of the flight attendants were offered reinstatement; and United 100 percent of the pilots were reinstated.

Is this accurate information?

Ms. FRANKOVICH. But the question is, When? If you're put out of a job for 3 years, is that the same as having a job? Continental flight attendants at one point had a 4-day strike in 1989. It was only 4 days. It took them; 9 months to return to work after that because the company put other people in their jobs. They hired permanent replacements for them.

In our case, it took more than 3 years before the last striker was offered a job. That's a heavy penalty. When the strike ends, the dispute should end. Our strike ended and our dispute went on. We continued to be punished. Although our strike was 2 months, we were held out of work for 3 years.

Ms. LENOIR. The other issue that your question doesn't address but that comes up with respect to permanent replacements is, whether there's a strike or not, the threat of being permanently replaced constantly sitting across the table from you as you sit down with your employer to try to bargain in a fair way the members you represent——

Mr. DUNCAN. Do you think that that threat keeps people from striking that would otherwise go on strike?

Ms. LENOIR. I believe so, absolutely.

Mr. DUNCAN. Then to ask the question that that leads into, Do you think this legislation would then encourage more strikes?

Ms. LENOIR. No.

Mr. DUNCAN. Why? That sounds inconsistent.

Ms. LENOIR. As I understand the legislation, it would force both parties to sit down at a negotiations table and negotiate with each other in fairness, in a fair and equitable way to make sure that when they meet at the table they don't meet at the table going on strike, management is not leaving to impose their last offer on the employee, but they're leaving with an agreement. That's what all this labor-management relations is supposed to be about.

Mr. KOURPIAS. Let me say that you start off in an economic strike. You're discussing wages, benefits, and the day that the permanent replacement issue hits the table, it's no longer an economic strike any longer. There is then no compromise. What are we to discuss? That's always there. That's what happened at Eastern. After the trustee took over, I believe he wanted a settlement. He in fact said that the only way that Eastern would survive is when they make peace with the workers. He said that. But there was no

way that was going to happen as long as the replacement workers were on the property and the real workers were outside. So you no longer have an economic strike because there is no compromise.

Mr. DUNCAN. We're supposed to deal mainly with the airline industry and aviation matters, but do any of you know what percentage of strikes in the last 10 years or so in which permanent replacements have been utilized?

Mr. KOURPIAS. We did a research in our union because we are probably one of the most diversified unions on the North American continent. We are in just about every industry. Somebody said earlier today that maybe the 1980s are not as bad on worker replacement as we think. In my own union alone—and this survey we started about 3 weeks ago—we found 40 companies that employed less than 1,000 workers that permanently replaced their workers.

We also represent workers in Canada, and this is not an issue up there. I also might say that because it's not an issue up there, there have less strikes in Canada then we have here.

Mr. DUNCAN. Are you saying that they permanently replaced all their workers, or just some of their workers?

Mr. KOURPIAS. Pardon me?

Mr. DUNCAN. When you said that they permanently replaced their workers, did you mean all their workers or just some of the workers?

Mr. KOURPIAS. I would imagine that once they put out the call to permanently replace, they permanently replaced them all, unless there were some that would like to cross the line.

Mr. DUNCAN. They wouldn't necessarily have to replace all of them, just like in these situations here. Some could be replaced and some might not be.

Thank you very much.

Mr. FRANKOVICH. In clarification to that question, I think what happens—as my brother is clearly explaining—when you replace, you permanently replace. They don't say that they'll take these permanent replacements and not those. Whoever crosses, they take. Whoever they hire, they keep. When you see the figures that say that 90 percent of the flight attendants, in one case, or 80 percent of the mechanics—or whoever is offered jobs later—that only has to do with future jobs that may come up later, sometimes much, much later. In the case of the Eastern people, not sufficiently soon before the carrier just dissolved—there is no offering there.

They don't select some out and get rid of them. They keep anybody and everybody they hire. The people they discriminate against are the people that are striking.

Mr. DUNCAN. What effect would this legislation have in right to work States?

Mr. KOURPIAS. No consequences whatsoever.

Mr. BABBITT. It shouldn't have. Not in my review of it.

Mr. DUNCAN. You all feel the same way?

Mr. OBERSTAR. If the gentleman would yield, in a right to work State, if a union exists, then——

Mr. KOURPIAS. The law would apply in the right to work States. Of course the law would apply, providing that unions exist in right to work States.

Mr. OBERSTAR. So it's not that there are no consequences whatsoever.

Mr. DUNCAN. What I was really asking about—and I think this is the way you took it—what effect would it have on non-union employees?

Mr. OBERSTAR. I think the points that the gentleman from Tennessee has raised are very important. They go really to the heart of this issue as to what is changed in the labor-management relationship by this legislation. Does it remove from management an important tool, or does it remove the ultimate weapon? If you consider permanent replacement as the atomic bomb of labor-management relation, then having that tool in the arsenal is the decider. But absent that tool, you do have a level playing field. To think that labor can go out on strike without a consequence is fantasy. To lose your job? To lose your income? To eventually lose your health benefits? Those are not inconsiderate consequences for being on strike.

So to say that this authority or this power is so important in maintaining balance, that labor can strike with impunity is nonsense. Nobody engages in a strike just to have fun, to go on vacation. None of the folks that I grew up with in Northern Minnesota wanted to have a strike so that they could have hunting season. That happened in due course. They didn't want to have a strike. They would rather not have one. You never make that money up. My father never made that income up.

Mr. LEITZ. The tables have changed in a lot of negotiations. We used to have a slogan, "No contract, no work". Now management tells us the same thing. "You will be locked out unless you agree to our last and final offer." They don't really do any more collective bargaining. When they start collective bargaining they keep going through the motions, and then the final day before the clock runs out, they say, "Here is our final offer, take it our leave it, and you can tell your membership that if they refuse it they will be permanently replaced."

Is that a level field? When they go out, they are permanently replaced. Then it becomes a fight to the death. When somebody says to me after 25 years on the job that I have been permanently replaced, I'm going to go out to kill that company. If I put 25 years of my life into that company, and that's the way they're going to treat me after 25 years, it's a fight to the death. That's what is happening.

Mr. OBERSTAR. Let me ask one last question. I think your point is right. If permanent replacement becomes a broad practice in every negotiation, then you might as well go out on strike right from the outset, forget the negotiating because you're going to lose your jobs anyway.

But the question of application of the bill to non-union workers, or workers in an industry that hasn't been organized, there is going to be some discussion when we get into markup on that point. The question could be raised as to the intent of application of this legislation. Is it intended to cover non-union employees?

Mr. KOURPIAS. At the present time, I think it is.

Mr. BABBITT. You've given us a little bit of a difficult question because the right to work laws don't apply to the Railway Labor

Act. This is not something that we normally deal with. But assuming that your question has to do with the effect on someone that chose not to—I'm assuming, first, that there was a union on a property, and that that union chose to withdraw its services legally. People that chose not to join that union stayed in.

Mr. OBERSTAR. That's an ancillary question.

Mr. BABBITT. Given your concern for that person, we don't see any effect on that person whatsoever. The traditional return to work, the seniority list—at least the disputes we've been involved in have a seniority list, they stay in the same seniority, and there is no negative impact on that person whatsoever. The dispute is over and everyone comes back. If he was half-way up the list when he started, that's exactly where he would be. There is nothing punitive, at least in our eyes, the way we view this legislation.

Mr. OBERSTAR. In the panoply of questions that will be asked about this when we get into markup, surely the wildcat strike that is not an authorized walkout will be raised. I don't know what the incident is in the airline industry. I haven't even researched that. I was just sitting here thinking through all the possibilities.

What would be the application of this legislation to an unauthorized walkout?

Mr. KOURPIAS. I think it would be unprotected.

Mr. OBERSTAR. There would be legal action right away by the employer.

Mr. Duncan, do you have any other questions?

Mr. DUNCAN. I have just a few more.

I understand that Congressman Clement and Congressman Boehlert are going to offer an amendment to specify that this legislation does not apply to non-union situations or non-union employees. What is your position or feeling about that amendment?

Mr. BABBITT. On behalf of ALPA, we obviously haven't reviewed that. I think we've all expressed our intent—it sounds like something that we can look at and be flexible with. I would obviously like to review the amendment, because it sounds like something that might clarify the intent.

Mr. LEITZ. We feel the same way.

Mr. KOURPIAS. The same with IAM. We want to look at it. It just really hit me today, too. We want to look at the amendment, study it, and then we'll get back to you.

Mr. DUNCAN. I've just noticed in some testimony from a witness that is going to testify later today, Mr. Potter and Mr. Yager. They say at one point, "It is claimed that until the 1980s employers rarely, if ever, hired *Mackay* replacements. To test this proposition, foundation researchers looked up every NLRB case in which the *Mackay* decision was cited—over 500 cases—and read each of these cases to determine whether *Mackay* replacements had actually been hired. The results showed that the use of *Mackay* replacements is hardly a phenomenon of the 1980s because 251 of these cases involved *Mackay* replacements, all but 22 occurring prior to the 1980s. The trend of these cases through the years since 1938 are shown in figure 1 of this statement. You will note that the use of *Mackay* replacements has remained at about the same level over the last 50 years."

What do you all think about that? In other words, he's saying that replacement of strikers has remained constant over these last 50 years. That's what these witnesses are saying. Does that not jive with what you find?

Mr. KOURPIAS. As I said earlier, that's not the record in our union. We can document up to this point 40 companies in the last 10 years and we just began the survey. We're just talking about he IAM. We're not talking about 90 other international unions in this country. I don't really know where that survey came from.

Mr. DUNCAN. How many strikes are you talking about? When you say 40 companies, how many strikes does that involve? Some strikes involve more than one company, so I assume you're not talking about 40 strikes.

Mr. KOURPIAS. The information that I have, Congressman, is that in the IAM 40 companies with less than 1,000 workers experienced——

Mr. DUNCAN. How many?

Mr. KOURPIAS. I don't have the figure on how many people would be involved.

Mr. DUNCAN. How many strikes has your union participated in during the same period of time?

Mr. KOURPIAS. I could get that information to you. Our experience of striking is extremely high of not striking. Sir, 99 percent of our agreements are settled without any work stoppage. We can get that figure for you as well.

Mr. DUNCAN. What do some of the others have to say about this? Do you think it's accurate or inaccurate?

Mr. BABBITT. I would like to make an observation. We've represented pilots, so I will focus just on the pilots. Really not knowing what base—this is an extremely broad field—I will just focus on pilots. We have represented pilots for over 60 years. In the last 10 years, we have only had 3 strikes, and in all 3 of those permanent replacements were involved. That is not the history prior to that point in time.

There have been other strikes and there has been some flirting with permanent replacements, but nothing of the scale that has gone on in the past 10 years. With two of those three strikes, it was the same person and neither of those were settled. It's ironic to note the often discussed settlement of Frank Lorenzo's Continental strike. The only reason that was settled through a court order and award was so that he could get out of bankruptcy. It was part of the plan of reorganization required by the creditors. So there was an outside force that brought that settlement. That's two of the three strikes that we've had with the same man.

So you're seeing someone—I have an advertisement that I brought over. This is the kind of invitation that goes out to permanent replacements. "Pilots, this is your road to success." The problem is that in the pavement here you can't see the bodies of the employees that helped work and build the airlines. That's what is making up the pavement. This is what goes out to attract a permanent replacement.

Our history has been fairly contemporary, and that's why we've taken the strong position that we have.

Mr. DUNCAN. Thank you very much.

Mr. LEITZ. Nationwide, in the last 8 years, we had 300 collective bargaining agreements, and we had only 3 strikes, too. The strikes that we did have on each property only involved people of bargaining units of 40 people or less. So they were very minor strikes and of very short duration.

Mr. OBERSTAR. Thank you very, very much. I appreciate the panel's patience in staying here for a very long time and responding to many questions that were all important questions and ones that will help us——

Ms. FRANKOVICH. May I insert one final little answer before we cut off here?

Mr. OBERSTAR. Certainly.

Ms. FRANKOVICH. In answer to Congressman Ballenger's comments earlier, I think he misstated the situation with crossover employees, stating that those people, in view of our request would seek loss of seniority. That is not the case. That is not the case at all. We instead seek that all people be treated properly within their seniority.

I wanted to reflect just a moment of my personal situation as an indication of the harm in the current situation of replacements. I had 21 years of seniority with TWA. I was based in Los Angeles where I had lived for 20 of the years of my employment. At the end of the strike, I was permanently replaced. People with no seniority—1 day—went into that operation instead of me. They will likely be there for the rest of my career and I will not.

I think I suffered enough by the economic cost during the course of the strike, let along by the permanent loss of my job for two and a half years, and then regaining my job and never gaining my place of employment. That's the current consequence. That's the consequence that we don't think is a fair burden for an employee to have to face. That's the sort of thing that we wish to have addressed.

I wouldn't seek to have somebody senior to me displaced. I would seek to be able to use my seniority to get where I should have been to begin with.

Mr. OBERSTAR. Thank you very much. That was a very good summary and statement of the case.

[Ms. Lenoir's prepared statement appears on page 149.]

[Captain Babbitt's prepared statement appears on page 95.]

[Ms. Frankovich's prepared statement appears on page 108.]

[Mr. Leitz' prepared statement appears on page 146.]

[Mr. Kourpias' prepared statement appears on page 116.]

Mr. OBERSTAR. Let us continue with Mr. Landry, Senior Vice President and General Counsel, Air Transport Association of America.

Welcome back to the committee. It seems that we have you for the witness of the month.

[Laughter.]

TESTIMONY OF JAMES E. LANDRY, SENIOR VICE PRESIDENT, AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA, ACCOMPANIED BY FRANK BERARDINO, SENIOR VICE PRESIDENT, AND CHIEF ECONOMIST, GELLMAN RESEARCH ASSOCIATES, INCORPORATED AND ROBERT J. DE LUCIA, VICE PRESIDENT, AND GENERAL COUNSEL, AIRLINE INDUSTRIAL RELATIONS CONFERENCE

Mr. LANDRY. I'm beginning to feel like the designated hitter. [Laughter.]

Mr. OBERSTAR. You can tell that your testimony was received already with great interest and has been commented upon.

Mr. LANDRY. Thank you, Mr. Chairman.

Mr. OBERSTAR. Would you please introduce your associates?

Mr. LANDRY. Certainly.

Mr. Chairman and Mr. Duncan, my name is Jim Landry. I am senior vice president and general counsel of the Air Transport Association of America. I am accompanied this afternoon by Frank Berardino, senior vice president and chief economist of Gellman Research Associates, Incorporated, and Robert J. DeLucia, vice president and general counsel of the Airline Industrial Relations Conference.

On behalf of its 20 U.S. air carrier members, which combined account for over 96 percent of the passengers and freight carried by air in this country, ATA urges the rejection of H.R. 5, the so-called striker replacement bill. This legislation seeks to amend the Federal labor laws to give economic strikers a right to return to their jobs in preference to other employees who elected to work during a strike, thereby permitting the employer to continue operations. In our view, this legislation is unneeded and unwarranted in the airline industry and would disrupt the delicate balance upon which our collective bargaining system is based.

In several other appearances before you and this subcommittee, I've described the impact of a dozen years of deregulation on the industry and on the American consumer, concluding, as I believe this subcommittee also does, that the single greatest beneficiary of deregulation, overwhelmingly, has been the consumer. These hearings are focusing on another major player in the drama of deregulation: labor. But as you will see, we strongly believe that the ultimate loser, if the bill before you becomes law, will be the consumer.

In these few brief minutes before you here today, let me explain why we so strongly feel that this is a baby with the bath water case. To put the issue in context, let me start with a couple of basic facts. In the 12 years of deregulation, from 1978 to 1990, the workforce of U.S. major and national air carriers, excluding the express package carriers, has climbed 46.4 percent, from 314,000 to 460,000. In the same time frame, the average compensation per employee of those carriers has climbed 67 percent, from $27,900 to $47,600.

Parenthetically, I would add that the workforce of the entire U.S. scheduled airline industry, including the express package carriers, has climbed by almost 200,000 employees in that time period, from 329,300 to 525,000 employees. Not surprisingly, a Bureau of Labor statistics analysis of data regarding 60 top U.S. industries in

1989 revealed that the airline industry ranked in the top 30 percent for average compensation per employee.

But, let us put some more flesh on those bones to explain our thesis on this issue more clearly. In my prepared statement, which I ask to be included in the record of this hearing, I explained that we commissioned a study by Gellman Research. This was an economic and financial analysis of the airlines' ability to withstand a labor strike.

We have submitted copies of that study to the subcommittee, and one of its principal authors, Mr. Berardino, is here at my side today.

What does that study reveal? First, evidence in the economic literature reveals that unionized employees in the airline industry are highly paid relative to individuals employed in comparable occupations. Mr. Berardino and other economists term such a surplus economic rent.

For example, evidence from other studies shows that airline workers earn wages that exceed the average wages of comparable workers by the following margins: Air freight agents, 58 percent; aircraft interior cleaners, 82 percent; aircraft inspectors, 48 percent. For pilots, the differences between pay scales at unionized and non-union carriers have exceeded 100 percent in some cases, while flight attendants earn wages about equal to those of more highly trained workers, such as teachers and nurses.

Several authors have attributed economic rents in the industry to the strong bargaining position of its unions. The proposed amendment to the Railway Labor Act will further increase the economic power of airline employees, with the following consequences: In the long run much of the added burden of higher wages will be borne by the flying public in the form of higher fares; airline output and employment will be lower than would be the case if the airline labor market were competitive; some workers that otherwise would have been employed in the industry will not be under the proposed legislation; and some consumers that otherwise would have flown will not.

Many airline firms are already under severe financial stress because of the Persian Gulf War and the state of the world economy. By placing additional financial stress on airlines, the new legislation may push more companies toward financial instability or bankruptcy, which could adversely affect competition in some city fare markets.

Most importantly for the purposes of this hearing, the study offered some very sobering conclusions regarding the effects of H.R. 5 on the ability of carriers to sustain operations during an ongoing strike. Specifically, it presents the results of an analysis of two of the strongest U.S. carriers operating in 1989—one large major and one small major—assuming that these carriers endure pilot strikes.

The purpose of this exercise is to understand how long such strong carriers can remain financially viable under the various circumstances posited in the strike scenarios. It is particularly important to develop some understanding of the degree to which carriers are placed in jeopardy as a result of the proposed legislation.

It is important to recognize that airlines share one characteristic with all other service industries. They cannot inventory output in

anticipation of a strike. This circumstance magnifies the financial jeopardy a carrier faces during a strike, particularly considering the capital intensiveness of the airline industry.

During a strike, an airline must continue to satisfy its fixed obligations, including payments of interest and long-term debt coming due. It must also pay its trade creditors or face being cut-off from such vital inputs as fuel, aircraft parts, and the ability to land at airports. These current liabilities, created when the carrier was operating at full scale, must be satisfied even as the airline operates at a fraction of its former level.

Furthermore, additional cash will be needed to fund the operating deficit from the ongoing operations during the strike. In sum, money will be going out much faster than it comes in, which can put the carrier in financial jeopardy quickly.

Some important trends emerged from the analysis of pilot strike scenarios. Even in a strike under present circumstances, when airlines can rehire permanent replacement workers, the two strong carriers analyzed in this study would experience significant financial stress and would be likely to run out of cash within 4 months. Under the proposed legislation, strikes of more than a few months duration would be likely to bankrupt even the strongest U.S. carriers.

The proposed legislation would tend to increase the bargaining power of airline unions and their ability to extend the duration of the strike. Airlines would have difficulty hiring temporary replacements because of the cost and time involved in training them, and because few workers would be attracted to temporary positions.

An airline would have few reasonable financing opportunities to sustain itself during a lengthy strike because lenders would be concerned about a carrier's ability to survive. A company might have difficulties selling its assets at fair market value to raise cash. To fulfill its fiduciary responsibility, management might decide to file under Chapter 11 of the bankruptcy code before running out of cash in order to preserve resources for investors and lenders.

These results have important implications for strikes by all airline worker groups because the effect of the proposed legislation will be to invest economic power in all employees, similar to that enjoyed by pilots.

In conclusion, it's important to note that the results of the strike scenarios are subject to the assumptions made. Because the scenarios were applied to two of the strongest airlines, under circumstances in which they otherwise made substantial profits—I remind you that we used 1989 as the base year and not 1990—and because the scenarios themselves were drawn conservatively, the results obtained are probably optimistic. A carrier entering a strike in a weaker financial state, or subject to substantial productivity losses and further market share erosion due to job actions or other union activities, would fare less well than the two carriers examined.

Given these results, the study concludes that carrier are at present unlikely to be willing to take strikes. Without the ability to replace workers, the threat to the viability of such firms will be so great that they will become even more strike-averse. As a result, the balance in labor-management relations in the airline industry will be upset. The size of the economic rents already enjoyed by air-

line workers will grow at the expense of consumers, investors in airline companies, and the general public. Even if airlines survive strikes, they will emerge as less effective competitors in both domestic and international markets.

A strike's competitive effects in international markets are particularly noteworthy because of the built-in rigidities in such markets. In domestic markets, there is a better chance that other airlines will provide substitute service for an airline either weakened or forced out of a business by a strike or other circumstances. In international markets, carrier substitutions are a matter of negotiations. The recent difficulties faced by United Airlines and American Airlines in attaining access to Heathrow Airport—as substitutes for Pan Am and TWA respectively-illustrate this point.

Throughout the 1980s, the market share of U.S. carriers in important international markets, including Europe, fell steadily as some U.S. airlines faced both mounting financial problems and foreign competitors that were often subsidized or operated by their governments.

It's important to note, however, that the United States has been in the forefront of nations attempting to reduce the rigidities in international aviation markets. Mr. Chairman, we thank this subcommittee, and you in particular, for the great support you've given us and the Executive Branch in this effort. As a consequence, there is reason to be hopeful in this respect. The hard-won productive efficiencies of the U.S. airline industry should make U.S. airlines more formidable and competitive in a freer economic environment.

The proposed legislation would have the effect of transferring hard-won productive efficiencies to labor groups, with negative implications for both international airline fares and the competitiveness of U.S. air carriers.

Thank you for giving us this opportunity to discuss a proposal that is of such critical importance to the airline industry.

My colleagues and I will be happy to answer any questions you may have.

Mr. OBERSTAR. Thank you very much, Mr. Landry. You have addressed the key issues very vigorously with ample backup. We appreciate your testimony.

You have heard the previous testimony here today that although the court case dates from the late 1930s in fact airline employers have rarely exercised the right to hire permanent replacements until the decade of the 1980s. How then can you characterize the *Mackay* ruling as a bedrock principle for 50 years when in fact, if anything, it was a dormant concept in the airline industry.

Mr. LANDRY. Mr. Chairman, I think that you and your colleagues overwhelming changed the situation in 1978. You have already alluded to the fact that you leveled the playing field with a measure that you introduced, an amendment to the Deregulation Act to do away with the mutual aid pact that had allowed some carriers to prosper during a strike.

Mr. OBERSTAR. Other carriers wanted that one removed. Those were the payers.

Mr. LANDRY. I believe the glamour had worn off.

[Laughter.]

Mr. LANDRY. I would remind you also that this Congress overwhelming said in the declaration of policy amendments that you legislated at that time, that the airlines were to become more efficient, that through that efficiency they were to offer lower and lower prices. I don't pretend to be an expert economist, but I can think of no way that you could offer lower and lower prices without somehow getting some control over your costs. You had to get some control over your unit costs, including your unit labor costs. That was a natural consequence of the Airline Deregulation Act.

Most critics have said that airline labor costs were out of control prior to 1978. Since that time, they have been under a fair measure of control, and yet, as my opening statement said, they went up 67 percent in that 12-year period.

Mr. OBERSTAR. But my point is not the increased labor costs, but that the *Mackay* doctrine was not the governing factor. It was not the bedrock principle that leveled labor-management relations for 50 years. I think that's a little exuberantly claimed. I just want to put this into a little more perspective.

The *Mackay* rule is a phenomenon of deregulation more than the pre-deregulation era, right?

Mr. LANDRY. As Mr. Berardino's study I think very fully demonstrates, an airline can no longer afford to take a strike very long, and couldn't afford to take it at all if you pass this legislation.

Mr. OBERSTAR. The real effective counterbalance is the fact, as I stated previously in this hearing, that the employees are without pay just as much as the employer is without income.

Mr. LANDRY. My heart went out to many of the previous witnesses that described the terrible situations that they have had to endure. They did exercise their choice, the right to strike. Others did not exercise that choice and returned to work. I'm only saying to you that while some mentioned that they could not return to their jobs for perhaps 2 or 3 years, I am saying to you that if this legislation is passed, that airline won't exist in two and a half years—it won't exist in 6 months.

Mr. OBERSTAR. And if the airline doesn't exist, neither do the airline stocks.

Mr. LANDRY. That's right.

Mr. OBERSTAR. So it's a fallacy to assume that there is no penalty or consequence for the workers that they can just go out on strike and bring the carriers to its knees. If they do, they have destroyed their own jobs if the carrier is out of business, as we have seen.

Mr. LANDRY. There are no winners in a strike nowadays.

Mr. OBERSTAR. So to have the gun at their heads saying, "If you go on strike, we will replace you," is more likely to produce the opposite effect. That was suggested in passing. I hope people caught that point. With the *Mackay* doctrine as a more active tool in management's hands, the attitude of workers is likely to be, "If that's your attitude, then let's shoot right from the outset. Why should we negotiate? Let's just shut it down right now."

Mr. LANDRY. We believe that if this legislation is enacted that their demands will become a bit more extreme and that the likelihood of strikes will increase dramatically.

I notice that Mr. Berardino appears to want to say something.

Mr. BERARDINO. I would just like to address briefly your first question, why this has become more of an issue in industry. I think there are probably two reasons, at least based on our review of economics. First, when the industry was deregulated the conditions that the carriers faced in the marketplace changed dramatically at that time.

The first thing that happened was that they could no longer depend on the CAB to pass forward cost increases on the flying public, as had been the case historically. I'm talking in generalities now. Before, airlines could depend on their being some kind of an industry standard for wages in the industry.

That no longer was the case. Prices set for the market would be set by the market and not by the CAB. Therefore the pressure was from the marketplace and not from the CAB. Every input that the airlines had to use had to be examined in that light. So the airlines came under increasing market pressure.

The second thing was that—and the reason the 1980s may not be a very good decade to look at in this regard—is that there was the potential for very wide differences in input costs based on new carriers and more established carriers. If you were an established carrier, you had a set of contracts that you had to deal with at that time, not only with regard to labor, but with regard to every other input including airport gates, airplanes, and everything else. Whereas if someone were to enter the business—and there were numerous entries—it would be a totally blank sheet of paper and everybody could start from a different position. So, faced with that, the larger airline faced a tremendous amount of pressure.

So putting those two things together—not to excuse what happened in several circumstances—but part of the pressure you saw was based on the market circumstances that the market found itself in.

Mr. OBERSTAR. Deregulation changed a great deal and opened some avenues that hadn't been thought of before deregulation.

I find it curious that the carriers, through your testimony, are saying that now in order to have a balanced labor-management negotiation and relationship they have to have this tool, this weapon to use in negotiation that previously had been infrequently used. Are you suggesting that now it is going to be more relied upon or more heavily used?

Mr. LANDRY. I don't think it will be more heavily used, but I think it does bring a levelness to those negotiating tables. Mr. DeLucia would undoubtedly be able to document that there have been hundreds and hundreds of labor negotiations settled peaceably and without severe controversy during that same decade.

Mr. OBERSTAR. Without use of that threat, though?

Mr. DELUCIA. Without saying the use of the threat, our overall track record has been superb. There are many reasons that we have had fewer strikes. One of the biggest is what we pay our employees. Top pilots make up to $198 an hour. Top flight attendants' incentive pay is up to $48 an hour. Mechanics make $21 to $23 an hour. I think our track record as far as what we pay our employees has been a major reason that we have had very few strikes.

Mr. OBERSTAR. Didn't Mr. Kourpias say that 99 percent of their labor-management negotiations are settled without a strike?

Mr. DELUCIA. Yes, and I would think that a system that works 99 percent of the time should be left in place. It ought not to be disrupted.

Mr. LANDRY. I hate to use the phrase, "If it ain't broke, don't fix it." I would say that $48 figure saddens me because it's more than I'm allowed to pay my assistant general counsels with 10 years experience as lawyers.

Mr. OBERSTAR. Maybe they ought to open the way to labor-management negotiations.

[Laughter.]

Mr. OBERSTAR. But the threat to replace those workers has not been laid on the table in the course of those numerous bargaining sessions. It's only in a rare few situations where it so tilts the balance of power that it is offensive.

Mr. LANDRY. But again, I would say that at the end of those stories there have been no winners.

Mr. OBERSTAR. That's right.

Mr. LANDRY. On either side.

Mr. OBERSTAR. Neither side is really a long-term winner in a strike. I just think that having that weapon available and having concomitantly with it the willingness to use it is going to poison the well.

Mr. LANDRY. Or you might say that one learns from that experience and perhaps doesn't utilize it except in the most extreme circumstances in which, as Mr. Berardino as suggested, you have to be able to operate or your airline is going to disappear.

Mr. OBERSTAR. But the workers are not in a position to say, "Mr. Airline, sorry. You've been a good fellah, we've liked you all this time, but we're making a new airline. We're hiring a new employer and you're gone." They can't do that.

But the employer can say, "Mr. Worker, Ms. Worker, sorry about that. It's been nice doing business with you, but we have someone to replace you. You are gone."

Mr. LANDRY. There was an interesting fact that was cited in Mr. Berardino's study concerning the United Airlines strike in 1985. It was less than 1 month in duration. It took 13 months for United to recover that market share.

Mr. OBERSTAR. It took 3 years for some of those flight attendants to even be offered a job back.

I don't like mirages and Mr. Fortney offered some mirages about rights of workers to be rehired, but 3 years is no right. You have starved, wiped out your mortgage, wiped out your health benefits—you know, Aid to Families with Dependent Children (AFDC) is not a viable competitor in the marketplace.

Mr. LANDRY. Again, that is a dramatic consequence of the strike. We are here to suggest that there are dramatic consequences for the airline industry and the consumers if this is legislated.

Mr. OBERSTAR. Thank you very much for your presentation.

Mr. LANDRY. Thank you very much, Mr. Chairman.

[Mr. Landry's prepared statement and other materials appear on page 123.]

Mr. OBERSTAR. The subcommittee welcomes to the witness table Professor David Westfall, John L. Gray Professor of Law at Har-

vard Law School; and Mr. Edward Potter, President of the Employment Policy Foundation.

Professor Westfall.

TESTIMONY OF DAVID WESTFALL, JOHN L. GRAY PROFESSOR OF LAW, HARVARD LAW SCHOOL, AND EDWARD POTTER, PRESIDENT, EMPLOYMENT POLICY FOUNDATION, ACCOMPANIED BY DANIEL V. YAGER, ESQUIRE

Mr. WESTFALL. Mr. Chairman and members of the subcommittee, I am delighted to have this opportunity to be here because it's sometimes said that on this important legislation my colleagues teaching labor law all over the country tend to be on the other and, in my view, the wrong side. I'm glad to have the opportunity to set forth my views as to why this legislation is unnecessary and unwise.

My statement and testimony is derived from my article that just came out "Striker Replacements and Employee Freedom of Choice" in the Winter issue of the Labor Lawyer and a copy of the article has been made available to the committee for the record.

Far from being the modest revision that its backers portray. H.R. 5 would fundamentally change our labor laws. For over 40 years, since the enactment of the Taft-Hartley Act in 1947, it has been a basic principle that employees can choose freely whether or not to strike or to engage in other concerted activities.

The committee has heard testimony this morning from representatives of unions and unionized employees and from representatives of management. No one has been here to speak on behalf of employees that are not union members and whose freedom of choice to engage in strikes and other protected activities would be abandoned if this unfortunate legislation should become law.

Both employers and unions have been prohibited from discriminating against an employee because of the choice that he or she makes, to go out on strike or not, and the same principle—although the Taft-Hartley Act, of course is not applicable to industries covered by the Railway Labor Act—the same principle has been recognized under the Railway Labor Act as well.

The bill would abolish that protection of employees' freedom of choice to strike or not to strike and in its place would be a mandated preference for strikers. The bill would write into law a requirement that individuals be rewarded for going out on strike by being given preference over non-striking employees.

Excessive and unreasonable union bargaining demands for wage increases and wasteful and uneconomic work rules would no longer be limited by the possibility that a strike could lead to permanent replacement of the strikers, with the following likely results:

First, employees would be free to strike repeatedly, no matter how excessive their demands were in relation to prevailing market wage rates, knowing that their jobs would always be waiting for them unless and until their employer eliminated the jobs or went out of business.

Ms. Frankovich, in her testimony, did not refer to the finding of the Federal District Court in the case between her union and TWA in which the court referred to her having acknowledged that TWA

could fill all the jobs for about one-third or less than what her union was seeking. Her union was seeking this for some of its members even with the possibility of permanent replacement as a result of the strike. If there were not the possibility of permanent replacement, what would stop her union from asking five times, eight times, the wage rate required to fill all vacancies, knowing that there would be nothing to keep the union from going out on strike if the employer did not meet its demands, and the union could always come back and any replacements would be told to go home.

Second, the mandated preference for strikers, without regard to the cause of the strike, would reduce employers' incentive to bargain in good faith. A number of witnesses have made the point—and I won't take the committee's time with it—that in the case of unfair labor practice strikers, if the strike is caused or prolonged by the unfair labor practices of the employer, the striker has an unqualified right to return not merely at the end of the strike—but anytime he demands—that the employer take him back.

This gives the employer a strong incentive to avoid committing unfair labor practices to avoid converting an economic strike into an unfair labor practice strike. The bill would have the effect of abolishing that distinction. The bill would say that it made no difference whether the strike was caused by unfair labor practices of the employer, or was simply an economic dispute between the employer and the union. In either case, the employees have the right to get the jobs back as described.

Therefore, employers would not have the incentive to bargain in good faith that they have today because of the rule that treats unfair labor practice strikes—such as one in which the employer does not bargain in good faith— differently than a regular economic strike. As a result, we could expect the quality of employers' bargaining to be less in compliance with the law than it is today.

One thing my colleagues that teach labor law agree with me on is that the enforcement of the requirements of bargaining in good faith is difficult for the NLRB. I think it important that this incentive be retained so that employers have a powerful reason to bargain in good faith and to attempt to reach a negotiated agreement with their employees.

The third development that I would anticipate if this legislation becomes law is that a strike-bound airline, railroad, or other struck firm would often be unable to operate efficiently with temporaries and non-striking employees as replacements. Several of the union witnesses made the point that it takes experience to produce a good pilot or a good flight attendant. The idea that an employer can expect to attract high-caliber personnel without at least being able to offer them the possibility that their jobs may survive the end of the strike seems to me to be highly unrealistic.

The result would be that railroads and airlines might not be able to continue operating, or operating efficiently, imposing burdens on shippers and travellers as well as on consumers of goods and services produced or transported by the struck firm.

I want to emphasize again the effect on the rights of employees that choose not to go on strike. The Taft-Hartley Act gives the right of employees not to participate in strikes and other protected

concerted activities, equal treatment with the right to go out on strike. The bill would abolish that. The bill would protect the right to strike without according equal protection to the right we have had ever since Taft-Hartley, and comparably under the Railway Labor Act, of employees not to participate in the strike.

The bill would clearly supersede the Supreme Court's decision in *TWA* v. *IFFA,* which was discussed by Ms. Frankovich and others, and which has the effect of maintaining the freedom of choice of employees to join the strike or not. If they did not join the strike and went back to work before the strike was over, *TWA* v. *IFFA* says that they cannot be displaced in order to reinstate strikers at the end of the strike.

I submit that is the normal result of going to work. Normally if you go to work you don't expect to be dismissed to make way for a returning striker. That right was upheld in *TWA* v. *IFFA*. The bill would abolish that protection of employees to continue working during a strike.

The results would be—both of that provision and of the ban on permanent replacement of strikers—a major change in the present balance of power between employers and unions, a balance that has served us well by protecting the right of employees to organize and bargain collectively without making them the exclusive owners of their jobs, no matter how much they choose to charge for the work they do and no matter how restrictive or inefficient the work rules they may seek to impose in collective bargaining.

Under H.R. 5, employers would be forced to discriminate in favor of strikers and against non-striking employees by denying the latter group any opportunities for permanent status and promotion that would otherwise go with their jobs.

Mr. Chairman and members of the committee, it seems to me that proponents of such a radical realignment in the way present law balances the interests of strikers, employers, and non-striking employees bear a heavy burden to justify the proposed change. I have sat here listening to the testimony, and I have read what has been written on the subject that I could get my hands on, and I have yet to find a persuasive statement of reasons for abandoning a principle that has served us so well ever since *Mackay Radio* was decided.

I want to take a few minutes to review the major arguments that are made in support of H.R. 5. A number of them you have already heard, and I won't take up the committee's time by going into them at length.

First, employees should not risk loss of their jobs for exercising the right to strike. Other witnesses have already pointed out to the committee that employees do not lose their jobs, but risk being permanently replaced. In some cases, it undoubtedly has very serious consequences, and in other cases the right that strikers have no preferential treatment when job openings become available is a very valuable right. If this were not the case, there would not have been the large number of cases litigating the right of reinstatement of permanently replaced strikers.

Furthermore, it has never been part of our law that the right to strike should be free of any unpleasant consequences. Even the union witnesses agree that if you go out on strike you don't get

paid while you're striking, although—as they do not emphasize—you get unemployment compensation in New York after 7 weeks, and you get unemployment compensation in many other States if the employer's operations are not curtailed as a result of the strike.

There was recently a telephone strike in my home State of Massachusetts. Unemployment compensation was paid to the striking employees—I believe to the extent of some $18 million—because it was determined that the company's operations were not curtailed as a result of the strike. So I don't believe it's correct to say that strikers get unemployment compensation only in New York. In New York, they get it automatically after 7 weeks. In other States, depending upon the terms of that particular State's law, they often get it if the employer's operations were not curtailed as a result of the strike.

A second argument is that employers rarely need to hire permanent replacements in order to operate during a strike. I would like to see my employer, Harvard University, find qualified teaching personnel on a temporary basis if all of us walked off the job and if the temps knew that they had their jobs only so long as we didn't choose to come back and tell them to go home. Even my colleague, Paul Weiler, who supports H.R. 5, surely would not contend that Harvard could operate with temporary teachers of a caliber of the faculty that it has today.

A third argument is that replacement employees receive at best only an illusory permanency of employment to the extent that the doctrine of the employment at will is enforced. They are still subject to termination. This is true, of course, but from the standpoint of an employee, there may be a tremendous difference if you were brought in to do a striker's job knowing that any time the striker chooses to come back you're out of work, and knowing that you have at least the possibility of a long-term relationship with the employer.

There have been a number of references to the fact that permanent replacement of strikers generates violence and ill will as in the Alaska Airlines case. But the violence and ill will can be created by hiring temporary replacements as well as permanent replacements. Temporary replacements are not likely to receive a cordial welcome when they go through the picket lines. So banning permanent replacements is not a way, in my view, to eliminate violence and ill will.

The argument is sometimes made that employers use the risk to employees from permanent replacement of strikers as an argument against unions in representation elections and the reality of such replacement to rid themselves of unions and union sympathizers. I don't believe either of those arguments stands up. If an employer argues in a representation campaign vote no, so that the union won't come in and call a strike and you are permanently replaced, that may persuade some employees. But even if the employer couldn't use permanent replacements some employees are fearful of union representation because unions have been known to make bargaining demands that put businesses out of business.

So the fear of losing your job as a result of voting a union in would not be eliminated by a ban on permanent replacement of strikers.

As far as employers using permanent replacements to get rid of unions, the Supreme Court has just told us that the Board need not—and indeed the employer cannot—assume that replacements do not want union representation. Therefore the employer continues to be under a duty to bargain with the union even though its members are out on strike and replacements have been hired.

Then we're sometimes told that *Mackay Radio* was a product of the times. My colleague, Paul Weiler, in testimony before another committee, went so far as to compare it with the thoroughly discredited separate but equal doctrine of Plessey and Ferguson, which was decided in the 1890s. That is a vast leap of faith, in my opinion.

Mackay Radio came into the law in 1938. There is ample evidence that it is consistent with the understanding of the Congress that passed the NLRA 3 years earlier. There is ample evidence that the Congress that passed Taft-Hartley in 1947 was totally—at least the House committee—was totally in sympathy with *Mackay Radio* and indeed said that *Mackay Radio* should be extended to unfair labor practice strikers because there was no need for them to strike when they had avenues of relief through the processes of the NLRB.

The ultimate result was not to include any such provision in the legislation because the committee concluded that it would complicate the definition of employee. But to bracket *Mackay Radio* with Plessey and Ferguson I think is rather far-fetched.

Then we are sometimes told that Canadian and other foreign experience with a ban on hiring permanent replacements demonstrates that employers can find temporaries to do the work. The other members of this panel have documented in greater detail than in my article the manifold differences between our major foreign economic competitors. To suggest that we should copy one particular feature of their law in isolation from the entire body of labor law, which in Japan, for example, is very different from the law that we know in this country—that seems to me to be totally unwarranted.

In particular, if we're copying foreign labor laws, don't let's copy Canada. Canada's unemployment rate is 50 percent higher than ours. The text writers deplore Canada's poor record in the frequency and duration of strikes. Canada may be a model in many respects, but it surely is not in labor laws.

An additional argument made against the Supreme Court's holding in *TWA* v. *IFFA*, which denied unreinstated strikers with greater seniority the right to displace crossovers, is that it permits employers to "bribe employees to break ranks with their fellows and the union reducing its militancy and effectiveness."

If what we're trying to protect is union militancy and effectiveness, I could make a number of suggestions to the committee. We would legalize secondary boycotts and we would go as far as Quebec has and make union membership mandatory in the construction industry. But I am confident that the committee and the Congress is concerned with protecting the rights of non-union

members, of individual workers, of employers, and the public, and that the criteria for labor legislation is not simply enhancing the militancy and effectiveness of unions.

Finally, I would like to comment on the statement that is made by some of my colleagues in labor law teaching that when they undertake to explain that striking employees can't be fired but can be permanently replaced that the classes break out in nervous laughter. During the years that I have taught labor law, that has never happened to me. I think it may be a matter of a difference in teaching styles.

I prefer to emphasize the important issues in the treatment of employees that have gone on strike, and who have been permanently replaced, and to highlight the differences between an employee in that position, and an employee that has simply been discharged. I encourage my colleagues in law teaching to teach their classes as well as I like to think I teach mine on this particular point.

I appreciate very much the opportunity the committee has given me to testify here today, and would be very happy to answer any questions you may have.

Mr. OBERSTAR. Thank you very much, Professor Westfall.

We will now hear from Mr. Potter and Mr. Yager.

Mr. POTTER. Thank you, Mr. Chairman and members of the committee. I am Edward Potter, president of the Employment Policy Foundation. With me today is Daniel Yager from the law firm of McGuiness & Williams. The Foundation appreciates the committee's invitation to present to you its findings regarding the merits of H.R. 5 that would overturn the Supreme Court's 1938 decision in *NLRB* v. *Mackay Radio and Telegraph Company*.

In the interest of time, Mr. Yager and I would like to summarize our testimony, but would request that our entire testimony be submitted into the record.

In 1990, the Foundation published a paper written by Dan Yager, "Has Labor Law Failed?" The monograph traces the history of congressional oversight and proposals to amend the NLRA and the RLA over the past two decades, including the proposal now found in H.R. 5 to overturn the *Mackay* decision. As associate minority counsel and minority counsel for the House Education and Labor Committee from 1983 to 1988, Mr. Yager performed the Republican staff work for a number of the hearings and legislative bills discussed in "Has Labor Law Failed?"

Subsequently, the Foundation asked Mr. Yager to conduct research for a policy paper assessing the merits of the arguments made by the proponents of H.R. 5. This resulted in the Foundation's recently released policy paper, "Loading the Scales: The Proposal to Overturn the *Mackay* Doctrine," the findings of which will be described to you in a moment.

In addition to conducting this policy analysis of the striker replacement legislation, the Foundation, in conjunction with the Council on Labor Law Equality, sponsored a national poll conducted by the Penn and Schoen Associates in January of 1991 on several labor law issues related to the striker replacement legislation. Penn and Schoen is a highly regarded New York and Washington, DC survey research firm that has performed similar studies for the

AFL-CIO and its member unions. The poll's results will be presented at the end of our testimony.

We respectfully submit a copy of the policy paper and the entire public opinion poll as part of this testimony for the hearing record.

Mr. Yager will now summarize the policy paper.

Mr. YAGER. Thank you.

Mr. Chairman, historically Congress has proceeded cautiously in regulating collective bargaining, whether it be under the National Labor Relations Act or the Railway Labor Act, which for purposes of our discussions today, has been interpreted consistently with the NLRA.

The first decade of the Wagner Act of 1935 showed that a law out of balance can produce disastrous economic effects and dislocations. The severity of the industrial strife immediately following World War II literally shook the political foundations of this country producing—and I realize this sounds like something out of H.G. Wells—a Republican Congress in the 1946 elections. That election resulted in the Taft-Hartley Act, which balanced the NLRA's restrictions on employer activities with restrictions on union activities.

Since that balance was added, with the exception of the 1959 act, the structure has been one that Congress has been loathe to tamper with in the absence of any public outcry, such as that in 1946. This reluctance has been equally reflected in the Railway Labor Act.

With strike activity currently at an all-time low, fulfilling one of the primary goals of our labor laws, any tampering with the law governing economic weapons must be founded upon the most solid public policy grounds.

With that in mind, the purpose of the Foundation's study was to consider each of the policy arguments offered in support of overturning the *Mackay* decision. I will discuss some of them.

Supporters of H.R. 5 contend that prior to the 1980s employers virtually never hired *Mackay* replacements and in recent years such hiring practices have become standard practice. This contention is absolutely essential for H.R. 5's proponents to rationalize 50 years of silence on this issue. The study examines both aspects of this contention, the alleged non-use prior to the 1980s, as well as its current usage.

When a student of labor law hears that prior to the 1980s no one hired replacements, he can only wonder how an entire body of case law developed around the use of strike replacements without real cases to shape that law. Thus, to test the proposition, Foundation researchers looked up every single NLRB case in which the *Mackay* decision was cited—over 500 cases—and read each of those cases to determine whether *Mackay* replacements had actually been hired. The results showed that the use of *Mackay* replacements is hardly a 1980s phenomenon. Of the 251 cases involving *Mackay* replacements, all but 22 occur prior to the 1980s.

The trend of these cases through the years since 1938 are shown in figure 1 of the testimony. As you can see, that trend has been rather steady. You will also note from figure 2 that the NLRB has not been shy about declaring strikes to be unfair labor practice strikes and ordering strikers to be reinstated with back pay. Thus

it is clear that *Mackay* replacements were hired on a limited but steady basis prior to the 1980s.

So we now turn to the second aspect of the usage argument, that the use of replacements has become a standard practice in the 1980s. Research conducted by the General Accounting Office, at the request of the sponsors of H.R. 5, refutes this contention. The GAO data shows that apart from a few highly publicized cases, strike replacements are anything but standard. In the 2-year study, 1985 and 1989, *Mackay* replacements were hired in only 17 percent of all strikes. More significantly, this affected only 4 percent of all strikers in 1985, dropping to 3 percent in 1989.

The Foundation study, coupled with the GAO study, lead to one conclusion. Since 1938 employers have had occasion to resort to hiring *Mackay* replacements on a limited but regular basis. This suggests that the need to preserve that option is clear. Yet, the use of the option is not so widespread as to diminish the strength of the strike weapon or to result in widespread economic dislocations.

But the actual usage of *Mackay* replacements only addresses half the question Congress must face. The larger issue turns on whether the Mackay doctrine is consistent with the industrial relations policies of this country. In arguing that *Mackay* contaminates our scheme of labor laws, proponents of H.R. 5 contend that the framers of those laws never intended *Mackay* and that it was purely a product of the U.S. Supreme Court's inventiveness.

If that was the case, one might have expected a congressional outcry after *Mackay* comparable to that of recent controversial decisions, yet no such complaints were made. In fact, a year after *Mackay* was decided, Senator Wagner himself stated, "Every step that the Supreme Court has taken toward clarifying the meaning and defining the scope of the act has made it easier for workers and employers to deal successfully under its provisions." The fact is that the legislative history in several instances, including a colloquy on the House floor, made it quite clear the employers would retain the right to hire replacements.

In fact, in the year following *Mackay*, another of the act's liberal architects, Senator La Follette, introduced a bill to prohibit the use of certain temporary strike replacements while pointing out that his bill would not "deprive an employer of the right to secure legitimate replacements so that he can renew operations with a force of bona fide employees."

If *Mackay* was acceptable to the Wagner Act's architects, why didn't they actually write it into the act itself? Probably because they felt it was too obvious to be stated. We discuss *Mackay* in terms of being a 50 year old principle. Actually, the legal ability of employers to replace strikers goes back thousands of years to the inception of employment relationships. In fact, had Congress not intended *Mackay*, a specific provision would have been necessary.

Ultimately, rather than rejecting *Mackay*, Congress actually codified it in 1959 by including within Section 9(c)(3) of the NLRA a provision allowing replaced economic strikers with voting rights for 1 year after the strike. This congressional acceptance of *Mackay* is fully understandable when one considers the scheme of our collective bargaining laws, which brings us to the next set of contentions.

It is claimed that *Mackay* undermines the right to strike and unfairly tilts the balance of economic power in the favor of the employer. While 50 years of robust strike activity would seem of itself to refute this, the argument goes to the very heart of what our labor laws are about.

To respond to this claim, one need only look to the explanations of our collective bargaining schemes provided by its strongest supporters, such as Professor Archibald Cox, the Warren Court, Justice Oliver Wendell Holmes, and Senator Wagner himself. Indeed, the title of the study, "Loading the Scales," refers to a quote from the distinguished jurist, Judge Learned Hand who stated in 1938 that in situations where an employer had committed no labor law violations in replacing strikers, it would "load the scales in an industrial dispute to give back the jobs to the strikers".

First, the right to strike, like rights such as free speech that are constitutionally guaranteed, are not absolute. It does enjoy substantial protections. It is no longer a crime, as was true in the early 19th century. A legal strike may no longer be enjoined, nor may employers chill the right to strike with intimidation or divide and conquer tactics.

But at some point, the right to strike must yield to the rights of others. As was observed in 1957 by Justice William Brennan, "This protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide." Thus when a union invokes the offensive weapon of the strike, the law allows the employer to invoke the defensive shield of operating with other employees. It should be noted that, in using this shield, the employer is not just protecting profit margins and market shares, but the jobs of other employees that are outside the striking unit.

Yet, the law imposes substantial restraints on the employer's ability to use replacements. Most significantly, the law only permits those employees to be paid what the employer was offering the strikers. Thus, if the strikers are saying, "We aren't going to work for you because you aren't offering us what we are worth," they run the risk that the employer might find others who will. In turn, if the employer were to be denied that opportunity, there are few constraints on the economic demands over which the union would call a strike.

The framers of the Wagner Act were very much attuned to a marketplace concept of wages and working conditions. They strongly believed that employees that had to negotiate wages and working conditions with their employer on an individual basis would never receive what they were worth. Thus, if the law were to protect their solidarity, they could gain enough negotiating strength collectively to be able to receive a fair return for their labors.

Is it unfair that striking workers should run the risk that the employer will find others who will accept his offer? The Warren Court didn't think so when it said in 1965: "The right to bargain collectively does not entail any right to insist on one's position free from economic disadvantage."

Even if replacements are hired, the employer cannot fire the strikers. As openings occur after the strike ends, he must reinstate the strikers. He must also continue to bargain with the union

which may—and it often does—result in an agreement reinstating the strikers, as is illustrated by the New York Daily News situation.

If *Mackay* seems harsh, so is the strike weapon itself, prompting Professor Archibald Cox to characterize our collective bargaining system as "a brute contest of economic power somewhat masked by polite manners and voluminous statistics." The key is to ensure that risks exist for both sides. Only then will the parties remain responsible at the bargaining table. If the risks are removed for one party—as would occur if *Mackay* were reversed—it would be like tying a catcher's throwing arm behind his back. The base runners would steal at will.

The fact remains that in the vast majority of instances, the system works quite well. The majority of collective bargaining situations do not result in a strike. The vast majority of strikes do not result in replacements, and even when they do, strikers often return to their jobs. These realities have characterized our system, not just in the 1950s, 1960s, and 1970s, but in the 1980s as well, and there is no reason to think that the 1990s will be any different.

One final note. It is claimed that virtually all our economic competitors prohibit the replacement of strikers and that this should be used as a model for the United States. As a parent, I recognize this refrain as a familiar one. Hopefully Congress will resist the temptation to do something just because everyone else is doing it. The point is that other countries not only reject *Mackay*, but they reject our entire industrial relations system, which is heavily enmeshed in our unique economic and social fabric.

If we wish to simply emulate these other countries, why not consider some of their other laws such as a prohibition in Germany against strikes, which would grievously wound a company; or doing away with any requirement that the parties try to reach an agreement, as in France.

Ultimately, changes in our labor laws have reflected strong public sentiment for change. At a time when industrial strife does not dominate our economic landscape, as it has in times past, one must ask whether the dramatic changes promised in H.R. 5 are something the American people yearn for.

To answer that, I would like to turn the microphone back over to Mr. Potter to discuss public sentiment.

Mr. POTTER. Between January 19th and 28th of 1991, Penn and Schoen Associates conducted a national telephone poll of 1,002 persons on several labor issues related to the striker replacement legislation. Mr. Chairman, 20 percent of the respondents were union members, slightly higher than their representation in the American public. The margin of error of the poll results was plus or minus 3.1 percent.

The poll was prompted by an earlier Penn and Schoen poll paid for by AFL–CIO in January of 1990, which has been touted as showing broad public support for H.R. 5 by the proponents of this legislation. However, its results are compromised because it asked a misleading and factually inaccurate question concerning the legal status of economic strikers that are replaced during a strike by *Mackay* replacements.

The AFL-CIO question leads the respondent to believe that economic strikers are fired when they exercise their right to strike under the NLRA and RLA, when in fact they continue to be employees of the firm and have "first in line" reinstatement rights when the strike is over. Under the NLRA and RLA, it is an unfair labor practice to discharge economic strikers.

As a result of this question—and I might point out that this was an isolated question and was not asked in the context of other labor relations issues—the Foundation decided to ask in a factually accurate and straightforward way a series of questions related to the striker replacement legislation, the highlights of which we present in this testimony.

First, the Penn and Schoen poll shows that 73 percent of all Americans say that unions have too much or just enough power. These are the same results as found by a March, 1990 Time-CNN poll that asked the same question.

Second, by a better than two to one margin, 64 percent to 28 percent, Americans do not want Congress to do more to protect labor unions.

Third, the Penn and Schoen poll shows that most people think that companies should have a right to operate if unions have the right to strike with 63 percent supporting the use of replacement workers during a strike as compared to 25 percent that opposed the use of replacement workers.

For our fourth question we asked a question that really goes to the heart of the legislative proposal concerning the permanence of the replacement workers. Penn and Schoen then asked a question, which results show that the public opposes the firing of replacement workers at the end of a strike by 54 percent to 34 percent.

The law currently does not permit injunctions to stop a strike if public safety is at stake. The Penn and Schoen poll shows that 84 percent of the American public thinks that judges should be able to enjoin strikes if public safety is in jeopardy. Significantly, union member respondents agree in about the same proportion as the public.

Sixth, there is broad public support, including union members, for requiring a secret ballot vote before a union can call a strike. An 84 percent to 11 percent majority favor a law that requires a secret ballot before a strike.

The broad public support for a secret ballot vote before a strike is important because of the results of a study by two Canadian researchers, Professors Morley Gunderson and Angelo Melino of the University of Toronto, who found in a study entitled "The Effects of Public Policy on Strike Duration" published by the Journal of Labor Economics, that this labor policy has the strongest negative relationship to the incidence and duration of strikes.

Seventh, strong majorities of Americans, including union members, favor a secret ballot election to determine whether a union can represent employees. Currently the law does not provide that. Penn and Schoen found that 79 percent favor requiring a secret ballot vote as opposed to 15 percent who disagree.

Finally, we asked a question dealing with the public's views concerning organized labor's representation of the workforce. Currently only about 12 percent of the private sector employees are repre-

sented by a union. A number of reasons have been advanced for this trend, but the Penn and Schoen poll indicates that most Americans do not favor a union at work. In the Penn and Schoen national sample, 59 percent opposed a union, while 27 percent favor a union in the work place. As mentioned, 20 percent of the persons polled were union members.

It is often stated that the reason employees oppose unions in the work place is because they are afraid of the employer's reaction. Only 1 percent of those opposed to unions stated that they were afraid of the employer's reaction and 54 percent said that unions were not relevant to their job, that unions would not help them in their situation, or that there were better ways to protect their interests than unions.

Thank you for your consideration of the Foundation policy findings. We'll be glad to answer any questions you may have.

Mr. OBERSTAR. Thank you very much for your presentations. They have all been very scholarly and thoughtful as well as well-prepared statements.

The Chair recognizes Mr. Duncan.

Mr. DUNCAN. Thank you, Mr. Chairman. I expected some questions from you.

Mr. OBERSTAR. In deference to you and your longevity here at this hearing——

[Laughter.]

Mr. DUNCAN. Thank you.

Mr. OBERSTAR. The fact that I had to step out for a few moments——

Mr. DUNCAN. Well, thank you.

Gentlemen, I've had a large number of union members in my district that have come to see me about this bill. Almost all of them are kind, hard-working people that I respect and like. They tell me over and over again that if there is a legal right to strike, why should they lose their jobs from this? That makes the right to strike meaningless or a joke.

You have heard some of that today. I think they would say to each of you that the positions you are taking are anti-worker.

Professor Westfall, do you feel that you're taking an anti-worker position here today? Do you feel like you're some sort of management stooge?

[Laughter.]

Mr. WESTFALL. No, sir, I don't think I'm taking an anti-worker position. Indeed, my position is that the worker's freedom is to choose whether to strike or not. What the bill would do is to withdraw that freedom, which we didn't have under the NLRA as originally enacted, but which was brought in in 1947 because we found that the results of not giving workers the freedom of choice as to strike or not had very unfortunate effects.

In 1946, we set an all-time record for strikes. So I regard this as an anti-worker bill. This is very clearly pro-union. As was brought out in earlier testimony, it would be a tremendous organizing tool for unions. I don't believe that's what this committee or this Congress is about. I think this Congress is concerned with protecting workers rather than simply advancing the organizing campaign.

Mr. DUNCAN. Mr. Yager or Mr. Potter, do you feel that this is an anti-worker bill?

Mr. YAGER. Absolutely. I think unfortunately that much of the focus of the debate on the bill has been on the workers that go out on strike. They have the same protections that they have had for the last 50 years. I think few people would argue that the National Labor Relations Act is an anti-worker law.

But I think the other workers that are frequently overlooked are not only the replacement workers, who would be required to be fired under this, but also the other workers that work for the firm. There was recently a strike involving the Harley Davidson company in Pennsylvania. About 1,000 Harley workers in York, Pennsylvania went out on strike. Because they went out on strike, 500 workers in Milwaukee were laid off. The workers in Milwaukee produce the drive trains for the motorcycles that were produced in York. When York went out on strike, Milwaukee workers had to be laid off. Those workers would also be affected by this bill. To the extent that their jobs and positions are protected by current law, I don't think opposition to the bill is anti-worker.

Mr. DUNCAN. Professor Westfall, do you think the bill would be improved by limiting it to workers represented by unions?

Mr. WESTFALL. Congressman, I don't believe it would. I think that, if anything, makes the bill more clearly something that is directed at enhancing union power, and which is discriminating against non-unionized workers. It seems to me that if the bill is a good thing—and I don't believe that it is—it's hard for me to see why it should be a good thing only for union members and not for non-unionized employees. I believe the bill should be totally defeated. I can see no justification for limiting it to union members.

Mr. DUNCAN. I asked some of the union representatives a while ago what effect they thought this bill would have in a right to work State. Tennessee is a right to work State. All of them basically felt that it would have no effect at all. Is that your feeling also?

Mr. WESTFALL. Congressman, I believe it would not have an effect on the legal situation in Tennessee. As you know, the right to work laws of the States do not apply under the Railway Labor Act, but under the Taft-Hartley Act, I believe that if it had no effect on the legal situation, it would of course be a tremendous bargaining tool because, as one of the earlier witnesses pointed out, the unions would then be able to say, "Join the union and you will never be fired."

Mr. DUNCAN. You may have heard me ask one of the union representatives if they thought that there were people that had not chosen to go on strike because of this fear of being permanently replaced. They responded affirmatively. Then I asked the next question, whether they thought this legislation would encourage strikes. They responded no.

Mr. WESTFALL. Congressman, I found that response very puzzling because it seemed to me that it is difficult to argue that the present situation discourages strikes because of the risk, and then to say that withdrawing that risk would not have the effect of increasing strikes. I think also, the point I referred to earlier in my testimony, by reducing the incentive for employees to bargain in good faith could be expected to increase strikes.

Mr. DUNCAN. Do you gentlemen feel the same way?

Mr. POTTER. Congressman, if I could respond to the previous question, we had one polling question where we asked the public whether they thought a prohibition on replacing workers would lead to an increase in strikes. The public, by a two to one margin, felt that it would increase the incidences of strikes.

So there is an intuitive feeling on the part of the public that that would occur.

You asked a question earlier concerning the impact of carving out an exception for non-union workers. I think it's worth pointing out that under the National Labor Relations Act that the rights that are provided under Section 7 apply both to union workers and non-union workers. The same right to strike applies in both contexts. Basically what you are doing is for the first time creating an exception relating simply to the issue of replacement workers when a non-union worker, for example, in a safety situation could on a concerted basis go off the job.

Under that proposed amendment what could result is that those employees would be treated differently than the unionized employees in the same situation.

Mr. DUNCAN. Is the Employment Policy Foundation a foundation financed by business groups? Do you represent businesses here today?

Mr. POTTER. We don't represent businesses directly, but all our funding comes from either corporate foundations or corporate contributions departments.

Mr. DUNCAN. I have received several thousand letters and petitions from union members. I have been visited by almost every union in this country. The union people seem to think that this is the survival of unionism all wrapped up in this bill. I have heard almost nothing from any business group. In fact, the first mention that I heard of this from a business group was just right before we broke for the Easter recess when four representatives of the Wholesale Grocers visited me—none of whom were from my district—and they mentioned it.

Then last week, when I spoke in Knoxville to the downtown rotary club, I mentioned this in passing as one of the issues in this Congress. The man in Knoxville, a very successful businessman, very intelligent had a question, "What is the striker replacement bill?"

That said to me that the business people are not talking about this bill. It seems like they've either been asleep or it doesn't really make that much difference. I have talked to several other members, and they are getting the same reactions in their districts. The reason I ask this is that it is so unusual compared to all these other bills up here.

Do any of you have any explanation about that?

Mr. YAGER. Although the Employment Policy Foundation is not involved in it, I am aware that there is a fairly active coalition working against the legislation, called the Alliance to Keep America Working. I suspect that as soon as they hear your comments, you will very likely hear from them.

[Laughter.]

Mr. YAGER. I can't explain to you why you haven't, but I can tell you from some of my other activities that there are a lot of businesses that are very much opposed to it.

Mr. DUNCAN. I have taken up too much time.

Mr. OBERSTAR. The gentleman has not taken up too much time at all.

A possible answer to the gentleman's question is that it has been made very clear that the Administration, the Labor Department, and some White House staff have already said that if it's passed by the Congress they would recommend a presidential veto. The White House has made very clear its position. The business community has probably taken a great deal of comfort in that cover.

The gentleman from Kansas?

Mr. NICHOLS. I will pass at this time.

Mr. OBERSTAR. The gentleman from North Carolina?

Mr. BALLENGER. Thank you, Mr. Chairman.

First of all, let me thank you for allowing to have a panel of people that are probably a little more sympathetic to my viewpoint than the ones we've had earlier. I think it's most considerate of you to do this for us. At times it hasn't occurred in my Education and Labor Committee. I would just like to congratulate you on doing that.

I would like to pass on a statement. Over and over again you read in the union propaganda the statement that the unions have lost their right to strike because of the replacement workers being hired. In reality, I would like somebody to—Dan, you have the knowledge to know that—there was a big argument here this morning. I don't know whether you were here at the time when the lady was saying, "Well as far as that goes, what's the difference between having a permanent replacement and being fired?"

We were discussing this further. There is a rather substantial difference in the right to have preferential rehire. We have information that shows that among the majority of the airlines, in spite of their strikes and so forth, the preferred rehire really worked in a rather strong situation.

Can you express your opinion on this?

Mr. YAGER. It isn't just preferential rehire. When you get fired, it's over between you and the company unless you want to apply again at some point in the future. But the relationship is completely severed and completely terminated.

If you are in fact replaced as a striker, and if the employer contends that you are being permanently replaced, there are any one of three possibilities that you can actually wind up back in that job. First is the preferential rehire where, to the extent that openings occur in the future, strikers get first shot at those openings, usually based on their seniority.

Secondly, the employer has a continuing obligation to bargain with the union. That obligation may very well result in a settlement of the strike, and frequently does. Although I'm not familiar with those situations, I suspect that might explain some of the situations in the airline industry.

Finally—and we have documented that this happens frequently under the NLRA—the NLRB could very well order the employer to reinstate the strikers because the employer committed an unfair

labor practice. That unfair labor practice does not just include union busting.

Union busting, to the extent that you're not bargaining in good faith and just trying to force a strike so that you can replace the strikers is an unfair labor practice, but there are a lot of other missteps that even a well-meaning employer can take that may affect only one of the strikers that could convert the entire strike into an unfair labor practice strike and result in reinstatement of the strikers. I discussed this at some length in the paper.

Mr. BALLENGER. I'm sorry I wasn't here during the earlier statements.

I have no further questions, Mr. Chairman.

Mr. OBERSTAR. The gentleman from Kansas?

Mr. NICHOLS. I would like to ask one question, since we're talking about some of this violence. If the striker does engage in violence during the course of the strike, then would the striker still have the right to get his job back at the end of the strike under this legislation? If so, is that appropriate, or is he going to be penalized?

Mr. YAGER. I think it's not clear because it could possibly be read either way. There are rules right now governing the reinstatement of strikers that engage in violence. It's not always clear that the employer can terminate those strikers. He can't if the violence isn't severe enough, or if the employer can't prove that that particular striker was the one that engaged in that violence, such as a shotgun fired in the middle of the night. The employer may try to terminate that striker, and in fact that is one of the things that can convert a strike into an unfair labor practice strike.

Generally, though, if the employer can prove that they engaged in a sufficient degree of violence, and that that was the employee, they don't have to provide reinstatement. It's not clear whether this bill would unsettle that. I think my response is that this bill is going back and rewriting the rules over the last 50 years. It could very well be that the NLRB and the courts could take this signal from Congress to say that they need to revisit these other issues because the bill clearly states that they cannot be permanently replaced, whether they engaged in violence or not.

Mr. NICHOLS. On the other side then, the proponents of the bill sometimes argue that when we hire permanent replacements it is just another subterfuge for union busting. How do you respond to that argument?

Mr. WESTFALL. Mr. Congressman, I believe that it cannot properly be used for union busting purposes under the doctrines that have been developed by the Board and the Supreme Court. The employer is required to continue to bargain with the union. The Board declines the ability to treat the replacement workers as being anti-union, so the employer's bargaining obligation continues.

An employer that seeks to use permanent replacement for union busting is likely to end up in deep trouble.

Mr. NICHOLS. We very much appreciate your testimony today.

Thank you.

Mr. OBERSTAR. Thank you.

Mr. Potter, as I read your testimony and the Foundation's study of the replacements, it appears to me that it was based on NLRB

actions. Did you not include Railway Labor Act cases in that study?

Mr. POTTER. No we did not. What we were trying to do was to evaluate the contentions of the proponents of the legislation that use of *Mackay* replacements had not been utilized prior to the 1980s. We tried to select a case that cut across the spectrum of the 50 years, and *Mackay* is the only case that allows you to do that.

There is no equivalent administrative agency under the Railway Labor Act, so we relied on reported NLRB case decisions to evaluate that claim.

Mr. OBERSTAR. Then you didn't look at those seven airline strikes since 1981 and the five cases of those seven in which replacement workers were used?

Mr. POTTER. No, we didn't. Another approach we could have taken was to take *Mackay* replacements and court decisions. We could have, but we were simply looking at it from an NLRB perspective.

Mr. OBERSTAR. Then your conclusion is that there are significant obstacles in the path of any employer that chooses to exercise the *Mackay* option. Certainly the airline experience would raise a question about that conclusion. There really is not a significant obstacle to an employer.

Mr. POTTER. Of course there are obstacles. The employer has to go through the expense of training, finding the people, and all the other things that go to putting together a workforce complement. Those situations that are documented in our policy paper are applied equally as well under the Railway Labor Act.

Mr. OBERSTAR. When an airline can train flight attendants in 18 hours—which I think is reprehensible. I just can't imagine the FAA permitting that to happen. If I had been Chairman of this committee at the time, I would have raised holy hell about it from a safety standpoint. But at any rate, that was done. So it is possible.

I think in this matter there are so many variables. In a full employment market, surely the workers have a little better opportunity and a little better advantage in bargaining because the employer can't readily and easily find replacements. That's going to differ from market to market and from industry to industry. But the fact is that in a real marketplace situation, if you're in a weak economy, where there is high unemployment, the worker is significantly at a disadvantage. There are many, many people lined up to take that worker's place.

So the bargaining position in a weak economy with high unemployment certainly tilts the balance, just by the natural force of events, in the hands of the employers.

So it's a matter of temporary hiring and so forth. It all depends on what the economic conditions are.

Mr. POTTER. I might just comment, Mr. Chairman, that our labor laws are based on the marketplace. The crucible of the marketplace is where the results of collective bargaining are dictated. As the Supreme Court has held many, many times, our labor laws are not designed to dictate a particular result. So in your examples, it is true that when you have low unemployment, using normal rules of supply and demand, they're going to have a certain kind of le-

verage that they don't have in a different kind of economy. But our labor laws are based on the expectation that that is going to occur.

Mr. OBERSTAR. National Football League owners didn't have trouble finding replacement workers during the football strike a little while ago, even though that's a fairly specialized profession. I suppose if I had been able to run 40 yards in 4 and a half seconds, they could have hired me.

[Laughter.]

Mr. OBERSTAR. When you say that the risks are removed for one party if the *Mackay* principle were reversed—I don't really understand that. Strikers lose pay. They don't have an income when they're on strike.

Mr. POTTER. But they are guaranteed their job back.

Mr. OBERSTAR. We heard the testimony today about those people that have been maybe 3 years down the pike——

Mr. POTTER. If the bill is passed——

Mr. OBERSTAR. I'm talking about current law.

Mr. WESTFALL. Mr. Chairman, I might comment on that. The——

Mr. OBERSTAR. It's not without risk.

Mr. WESTFALL. It's not without risk, but they don't always lose their pay. In high labor markets, as your earlier comments brought out, strikers often take other jobs so they have no loss of pay at all. Particularly in the construction industry labor is in high demand. Even without that situation, the availability of unemployment compensation may mean—there's no unemployment compensation for a struck business.

Mr. OBERSTAR. Have you ever been on strike?

Mr. WESTFALL. No, sir.

Mr. OBERSTAR. Did you grow up in a family that had a head of household that was on strike?

Mr. WESTFALL. No, sir, I can't say I have.

Mr. OBERSTAR. Let me tell you, that's a rather loose statement. To live under those conditions—and I did—there are no easy outs. Believe me.

You read a Supreme Court statement that I thought was very telling, that employees should not be free from economic disadvantage.

Mr. WESTFALL. American Shipbuilding.

Mr. OBERSTAR. That's exactly the case in labor-management negotiations. There is an economic penalty if you choose to withhold your services. Management withholds payment and benefits.

You say that H.R. 5 is a tremendous organizing tool for unions. I have never heard that issue raised. The *Mackay* permanent replacement worker business is really a recent phenomenon, despite all the history that you've cited. The significance of that tool, that weapon, is a phenomenon of the decade of the 1980s.

I have never heard that used as an organizing—that we have to get this passed in order to protect your job. Even the other side of the argument—the 1940s, the 1950s, the 1960s, or the 1970s—rarely was it a factor used by employers, that "either you negotiate or we will replace you." This is a recent change of mindset.

Mr. WESTFALL. Mr. Chairman, with great respect, I believe that the Florida East Coast Railroad, which produced a great many

court decision's in this area in the 1960s, managed to operate with replacement workers.

With great respect, I would question whether it is indeed a phenomenon of the 1980s. It seems to me that a number of earlier decisions held that strikers are entitled to be at the head of the cue—so-called Laidlaw rights. That was a 1968 case. I would question that this is a 1980s phenomenon.

Mr. OBERSTAR. Used to break a union.

Mr. WESTFALL. Used to break a union?

Mr. OBERSTAR. It was Mr. Lorenzo that really dramatized the issue and made it a fearful and fearsome weapon.

Mr. WESTFALL. Well, sir, he did it on a larger scale, but the Florida East Coast Railroad was able to resume operations.

Mr. OBERSTAR. It was not until the 1980s—and my sense, of (PATCO) the labor movement is that until Professional Air Traffic Controllers Organization's striker replacement was not something that was a matter of great fear or concern among worker groups, and it was not a weapon dangled out there by employers.

Mr. YAGER. In 1959, when the Congress passed the Landrum-Griffin Amendment, that was a big issue in the bill because in the middle of that decade—there had been other instances, but this was perhaps the most immediate and dramatic instance—the O'Sullivan Rubber Corporation replaced some 340 strikers during a strike, immediately brought in replacements, and immediately had a decertification election. The strikers were not allowed to vote.

Congress revisited the act and granted economic strikers voting rights for one year following the commencement of the strike. Senator John Kennedy on the Senate Floor said that "this now fixes the union busting problem." He did not complain about the *Mackay* doctrine, and he did not complain about O'Sullivan's hiring of replacements.

Mr. OBERSTAR. I think that there is a new prominence to this issue through the decade of the 1980s and now into this decade that if the *Mackay* doctrine becomes the principal negotiating tool, what motivation is there for workers to negotiate? On the other hand, what motivation is there for employers to negotiate?

I understand that if there's bad faith bargaining and all that—but the fact is that both sides know that if they sit down across the table from one another, the employer has let it be known, by body language or other ways to avoid being directly hit for bargaining in bad faith, "here's the paper. Take it or you are replaced." If that becomes the principal driving force of the negotiation, what motivation is there for the employer to offer decent economic incentives for the employees?

Mr. WESTFALL. Mr. Chairman, I believe that the incentive for the employer, which none of the witnesses have referred to, is the concern about keeping an experienced, productive workforce, maintaining good working relations with the employees. I would submit, Mr. Chairman, that at least part of the decline in union membership, which is often referred to, is the result of better and more enlightened treatment by employers. We no longer have—we may have some of the horrible examples that have been referred to in today's testimony, but many other employers have found it in their

best interest to negotiate in good faith and to reach reasonable settlements with unions.

I would also like to comment on the PATCO matter, because that is frequently referred to as having been the beginning of the era of the use of permanent replacement as a union busting device. I think it's important to keep in mind that in PATCO the strike was illegal. Therefore, while it may have been symbolic of a different White House perspective, it really is not part of the permanent replacement issue.

Mr. OBERSTAR. It was a very powerful signal.

Mr. WESTFALL. Yes, sir, it was.

Mr. OBERSTAR. You state the case. Those are, and ought to be, good and valid reasons—retaining the trained, skilled workforce, difficulty replacing them without significant cost. The example of PATCO—I expect it cost us well over $1 billion to train replacement air traffic controllers, more than it would have cost us to train replacements through natural attrition. It's enormously costly to the public, not to mention to the airlines during the early months after that strike.

So those are all good and valid reasons, but I think that widespread use of the Mackay principle really tilts the balance grievously in one direction of labor-management relations. It's used with vigor and enthusiasm by the management groups. If it's used in moderation, if all employers were of a judicious nature, and wise, and pleasant in demeanor as you have been, Professor——

[Laughter.]

Mr. OBERSTAR. I would have comfort in leaving the law as is.

Mr. WESTFALL. Thank you, sir.

Mr. POTTER. Mr. Chairman, I don't have the GAO study with me, but you know that GAO found that employers use strike replacements in 17 percent of all strikes and that 3 percent of all strikers were affected. But there is a part of this study that leads me to believe that perhaps the problem has blown up, at least on the union side, to be greater than the problem really is. GAO asked both the management and union respondents what their view was as to the percentage of strikes in which permanent replacements were used. Their response was way out of line with this 17 percent. It was closer to 50 percent.

So it strikes me that there is a lot of emotion behind this issue, some justified and perhaps some not. But that view is far larger than the 17 percent actual experience.

Mr. OBERSTAR. You can take that analysis a step further and apply it to airlines and five-sevenths is over 70 percent. So it is a major factor.

Does the gentleman from Kansas have any further questions?

Mr. NICHOLS. No, I think we've done an excellent job of covering this.

Mr. OBERSTAR. Thank you very much for your presentation, for a contrasting viewpoint, and for some very thoughtful observations about this issue.

[Mr. Westfall's prepared statement appears on page 185.]
[Mr. Potter's prepared statement appears on page 160.]
Mr. OBERSTAR. The subcommittee is adjourned.

[Whereupon, at 3:43 p.m., the subcommittee adjourned, to reconvene at the call of the Chair.]

PREPARED STATEMENTS OF WITNESSES.

STATEMENT OF

CAPTAIN J. RANDOLPH BABBITT

PRESIDENT, AIR LINE PILOTS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON AVIATION

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 5

APRIL 10, 1991

Good morning, Mr. Chairman and members of the Subcommittee. I'm Captain Randolph Babbitt, president of the Air Line Pilots Association. ALPA represents 43,000 pilots at 44 airlines, and I'm very appreciative to the subcommittee for this opportunity to speak on behalf of these pilots in strong support of H.R. 5.

This legislation is needed to protect employees from being permanently replaced and losing their jobs if they are involved in a legal strike. Of course, it's illegal to fire an employee for striking during a labor dispute, and even those who aren't especially pro-union agree with that law. However, I ask you: If an employee cannot return to his job after the end of a legal strike because someone hired during a strike has permanently replaced him, is he not just as unemployed as if he had been fired? The end result is the same: He has no job and he has no pay check.

A federal law prohibits employers from firing strikers, but the right to hire permanent replacements is the result of a judicial ruling in the Mackay Radio case in 1938. In the past decade, that ruling has been notoriously abused, much to the detriment of working men and women and to the balance of power in collective bargaining. Because of the present imbalance of power, the nation's labor movement is under tremendous pressure. Without equity in labor-management relations, labor will be forced to continue playing on an uneven field, thus causing an even greater imbalance in our system, which relies on good faith, fair bargaining. We therefore seek legislation to prohibit the use of permanent replacements to destroy the careers of legally striking employees.

Many of you studying this legislation understand intellectually how difficult it must be for a striking employee to lose his job to a permanent replacement, but it most likely hasn't been a personal experience for you. For me, it has been. I was a pilot at Eastern Air Lines for 24 years, a senior captain. I had followed in my father's footsteps; he was an Eastern pilot before me. Along with 98 percent of the Eastern pilots, and the Eastern flight attendants, I honored the machinists' picket line, legally called in another confrontation with Frank Lorenzo. When our legal sympathy strike ended, I was not recalled. Over one year later, I still had not been recalled, even though I was number 62 on the recall list to go back to work -- because 800 permanent replacements with less than one year of seniority and experience had taken our jobs during the strike.

I can't describe the pain we pilots felt who had been replaced. We were well-trained, experienced pilots, whose jobs were taken from us because we had exercised our legal right to honor another union's legal strike. Our years of experience in many cases were, ironically, damaging in terms of finding new jobs at other airlines -- some airlines wouldn't even interview those over 45 years of age. And those who were lucky enough to get hired -- started over at the bottom of the seniority list at another airline. Captains with over 20 years of seniority became second officers, at a fraction of their Eastern salary, sharing training classes with young men and women just starting their careers, with no real hope of ever becoming captains again.

Over 200 of the former striking Eastern pilots served as fighter pilots in the air war in the Persian Gulf. They have very rightly been hailed as heroes; their skill and bravery made us all proud. When they come home, however, they'll be unemployed. Even had Eastern survived, they would still be unemployed, because they had been permanently replaced. I submit that something is terribly wrong with our nation's labor law and policy when such wrongs can be legally committed and good working people punished for exercising their legal rights.

ALPA has always considered a strike to be a last-ditch weapon in labor-management relations. No employee wants to strike; it means he gets no pay check! It hurts his company. But in the present labor-management arena, — now an employee is not just losing his pay check -- he's risking his career!

Why has management suddenly become so powerful and labor so threatened? Why has the strike become a weapon for management instead of labor? What has changed?

The law hasn't changed since 1938. Replacement employees have been legal since then, but until recent years employers had usually chosen to negotiate back-to-work agreements at the conclusion of a strike, providing that the pre-strike experienced employees replaced those hired temporarily to keep the business operating during the strike.

This changed in the airline industry in 1980 when flight attendants struck Continental and many were permanently replaced. However, the biggest change in attitude toward strikers occurred as the result of the air traffic controllers strike of 1981, when President Reagan fired all of the striking controllers and replaced them permanently. Obviously, because of its illegality, the PATCO strike differed from those of private sector employee strikes that followed, but the example set by the Reagan administration has emboldened management in the private sector to employ the most confrontational tactics. In this atmosphere, strikes have escalated from economic strikes over wages and working conditions to all-out ideological and economic warfare to determine whether the company or the union, or neither, will survive. Employers have used permanent replacements not only to carry on business during a strike but also to develop a nonunion work force. Frank Lorenzo's *modus operandi* was based upon the provocation of strikes in order to break unions. That's exactly what he did to more than a half dozen unions at Texas International,

Continental, and Eastern. When the confrontation between management and labor becomes a holy war instead of a difference over economic issues, this is not a traditional economic strike; this is a disaster for all involved.

The freedom to continue operations during a strike with replacements should not imply the power to grant those replacements permanent ~~tenure~~ Future. This flies in the face of a fundamental premise of American labor law, which seeks to provide labor with enough power to be an adequate adversary for management in order to achieve fair wages, decent working conditions, and fair treatment of employees.

Those who oppose H.R. 5 say that if permanent replacements are not permitted, more strikes would result and labor turmoil would increase, to the detriment of the public. I can unequivocally state that this would not happen in the aviation industry.

In the deregulated environment, our airlines must be competitive. Airline employees know full well that their jobs depend on the ability to compete in the marketplace. They also know that their wages and working conditions are tied to the economic health of their employers. Now more than ever, pilots and other transportation employees want to settle their differences with their employers through bargaining, rather than strike action, and our federal statutes should promote harmony and solutions, not divisiveness and acrimony.

Pilots are cautious and risk averse by nature; after all, those are the qualities you want in a pilot. The recent pilot strikes have been the result of managements who stonewalled and maneuvered to force the workers into a strike, planning all along to use the strike as an opportunity to replace workers and drive the unions from the properties.

We believe that the elimination of the permanent replacement option as proposed in H.R. 5 will help to stabilize the industry, not destabilize it, as its detractors fear. We believe that the continued use of permanent replacements, or the threat of that use, results in conflict and confrontation and, in recent instances, chaos.

On behalf of the nation's airline pilots, I ask that fairness and equity be re-established between labor and management. Our industry is suffering economic woes, caused in many cases by the greed of unscrupulous managements. The careers of many fine pilots and other transportation employees have already been destroyed because the law provides no protection when management seeks to punish its employees and rid itself of organized unions and their contracts. This is wrong, and this wrong must be righted.

To achieve the type of labor relations atmosphere our nation's workers and citizens deserve and should enjoy, will require a conscious tripartite commitment between labor and management and our government. We're ready to do our part -- I ask your help.

Thank you for the opportunity to express the views of the Air Line Pilots Association in support of this important legislation.

STATEMENT OF
DAVID S. FORTNEY
DEPUTY SOLICITOR OF LABOR FOR NATIONAL OPERATIONS
BEFORE THE AVIATION SUBCOMMITTEE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

April 10, 1991

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to present the position of the Administration on H.R. 5. This bill would amend both the National Labor Relations Act and the Railway Labor Act to prohibit employers from utilizing permanent replacement employees during a labor dispute, and from granting employment preferences at the conclusion of a labor dispute.

As we have stated in testimony on March 6, 1991 before the Labor-Management Relations Subcommittee of the House Education and Labor Committee, the Administration opposes H.R. 5, and if the bill were presented to the President, his senior advisers would recommend a veto.

You have asked that we direct our comments to the Railway Labor Act. However, it must be noted that the impact of H.R. 5 would be felt well beyond the railroad and air transport industries, which fall within the purview of the Railway Labor Act. This legislation would override sixty years of law and experience in collective bargaining. This process, though not

painless, has served the public interest well, and has contributed to the economic well-being of this country by reducing labor strife and encouraging dispute settlement.

One of the Administration's primary objectives is to further America's productive and competitive capacities in the face of stiff competition in global markets, increasingly sophisticated technologies, and shifts in workforce composition. Modern labor management relations exists in an environment where the parties have the ability to resort to a mix of cooperation and confrontation in testing each other's bargaining positions and resolve. The National Labor Relations Act and the Railway Labor Act reflect this balance. They provide a dynamic framework which is flexible enough to govern cooperative dispute resolution as well as the parties' use of confrontational economic weapons such as strikes. If enacted, H.R. 5 would eliminate a major check on precipitous striking, promote increased labor unrest, and disrupt the flow of commerce.

The 1926 Railway Labor Act (RLA) and the 1935 National Labor Relations Act (NLRA) arose from a common purpose: to reduce labor strife and thereby avoid interruption to the flow of commerce by protecting the right of employees to organize and bargain collectively. Though the objectives are similar, and both statutes reflect a primary reliance upon voluntary rather than compulsory means of settlement of labor disputes, the RLA

provides for extensive negotiation and mediation procedures that must be complied with before the parties are permitted to resort to self-help. Conversely, while under the NLRA the parties also are required to bargain in good faith, the use of mediation is voluntary, and the parties, absent contractual restrictions, are permitted to employ economic weapons such as a strike or a lockout to pursue bargaining objectives.

The differences between the RLA and the NLRA resulted from a number of factors. For example, the economic climate in 1935 was vastly different from that of 1926. Further, the RLA was fashioned to govern labor relations in a single industry (the Act was extended to air carriers in 1936), with a workforce that was national in scope. Most important, perhaps, was that rail strikes were considered a severe threat to national security. Accordingly, the law was designed to defer the utilization of economic weapons until the weight of public opinion had been brought to bear on the dispute. The RLA empowers the President of the United States to create an emergency board, whose recommendations, though non-binding, are made public and often form the basis of an agreement.

It is also important to emphasize that the RLA prohibits strikes, and therefore the permanent replacement of strikers, until bargaining parties have completed intensively supervised negotiations. Further, this mediatory effort continues until the

National Mediation Board (NMB) deems that further mediation is futile. Even at this obvious point of impasse, the parties are not yet free to utilize economic weapons. The Railway Labor Act mandates that the NMB endeavor to persuade the parties to submit their controversy to arbitration. Finally, those constraints continue as the NMB determines whether a recommendation to convene an emergency board should be forwarded to the President, and, if so recommended and convened, until the emergency board issues its report for the consideration of the President.

Notwithstanding this statutory emphasis on mediation, the RLA shares with the NLRA adherence to the principle that labor disputes are best resolved through voluntary accord rather than imposition of substantive terms by a third party.

Since the passage of the Railway Labor Act in 1926, organized labor and employers have developed sophisticated economic weapons in pursuit of bargaining demands. Generally, if the economic weapons utilized by the bargaining parties do not threaten the bargaining process or a union's representational status, and the parties have adhered to the deferral procedures of the RLA, federal courts, mindful of the principle of industrial self-government, have been loath to interfere.

We are concerned that if the right to permanently replace strikers were prohibited, it would make use of the strike weapon

more likely. The system, as it exists today, has proven to be in the public interest. It furthers the objective of the NLRA and RLA, which is to promote labor peace by encouraging voluntary agreements governing relations between unions and employers. Indeed, given that the great majority of the rail industry workforce is unionized, a shift in the collective bargaining balance would be more pronounced than in the remainder of the private sector. The Administration is concerned that H.R. 5, if enacted, would destroy the balance in this nation's system of collective bargaining.

In sum, the rules that govern collective bargaining and the use of replacement workers under the RLA were well-conceived and have permitted that process to function as designed while providing adequate protection to all parties.

CONCLUSION

If enacted, H.R. 5 would destroy a prime component of the economic balance in RLA collective bargaining. No data have been presented that would indicate that this aspect of our nation's system of labor-management relations, balanced through sixty years of scrutiny, is in need of revision. Indeed, the evidence illustrates the value and continuing strength of our nation's labor policies.

There have been strikes in which deleterious behavior by some who support the union has brought voices crying for punishment for all. Similarly, there have been times a particular business or employer will act in a way which brings support from no one. But that does not and should not mean we should change the rules which have served the majority of those representing either side in any labor or management dispute. The process has worked.

For the reasons set forth above, the Administration opposes enactment of H.R. 5, and as I stated at the outset, if the bill were presented to the President, his senior advisers would recommend that he veto it.

STATEMENT OF

VICKI FRANKOVICH

PRESIDENT

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

BEFORE THE

SUBCOMMITTEE ON AVIATION

PUBLIC WORKS AND TRANSPORTATION COMMITTEE

U. S. HOUSE OF REPRESENTATIVES

APRIL 10, 1991

Mr. Chairman and Members of the Subcommittee:

I am Vicki Frankovich, President of the Independent Federation of Flight Attendants (IFFA) representing 7,500 flight attendants at Trans World Airlines. I am testifying on behalf of four unions representing 36,000 flight attendants at American, Continental, Pan Am and TWA. The flight attendants at Continental and TWA know painfully well the horrors and inequities caused by the hiring of permanent replacement workers during a strike. Due to my position, I will focus on the TWA case. We appreciate this opportunity to tell our story.

IFFA was forced out on strike on March 7, 1986 and during the 72 day strike that ensued, 2,800 permanent replacement strikers were hired. The circumstances that brought about this conflict began in the summer of 1985 when TWA was "put into play" as a stock takeover target of corporate raider Carl Icahn. The ownership, and therefore the future of the airline and its 29,000 employees, was suddenly at great risk.

In less than a month TWA had selected a "white knight" to save us from doom. The "savior" was none other than infamous union busting Frank Lorenzo, fresh from Continental Airlines where he permanently replaced that workforce and abrogated union contracts using the guise of bankruptcy.

In the battle of the raiders, it was clear that regardless of the victor, TWA would have a new owner. It was also clear that whoever prevailed intended to demand substantial employee concessions to pay for the debt servicing, legal fees, greenmail and other takeover costs.

When the dust settled, Frank Lorenzo walked away with over $40

million in "greenmail"; TWA paid a reported additional $20 million in legal fees, advertising and other takeover battle costs; and the airline was saddled with millions of dollars in new debt financing.

Ultimately, Carl Icahn extracted more than an estimated $320 million from TWA employees in concessions to cover these costs. First, Mr. Icahn accepted an estimated $100-110 million from the TWA pilots represented by ALPA whose total cost of labor was $368 million and whose average salary was $90,000 a year, a cut of 26-30%. Next, he took from IAM employees (mechanics, ramp service, dining and commissary), whose total cost of labor was $440 million and whose average salary was $36,500, an estimated $49 million in concessions, or an 11% cut. He then imposed on the management and non-contract ranks a 14% salary cut with an assurance that non-contract employees would not be required to take more cuts than contract employees. Finally when dealing with flight attendants, whose total cost of labor was $285 million, with an average salary of $35,000, he demanded a concession package that he publicly estimated was worth $110 million, a 40% cut.

Eighty-five percent of the flight attendant workforce was female and more than one-third were over 40 years of age. Average service with TWA was 15 years. Carl Icahn brought an outmoded, stereotypical image of the flight attendant workforce into his negotiations with IFFA. He demanded a disproportionate share of concessions with the glib justification that "stewardesses are second incomes" and "the girls don't need the money." When he was advised that the flight attendants, like all other workers, worked because they needed the money, he

4

replied that anyone who could not afford the cut "should have married a rich husband" or "should have married a pilot."

Asked why a janitor who was paid about the same as a flight attendant should be given a lesser pay cut with no change in hours or benefits, while the demand from the flight attendants was a 22% pay cut plus massive proposed work rule, insurance and retirement reduction burdens, Mr. Icahn responded that "a janitor is a breadwinner, he probably has a family at home to support. You girls are second incomes."

Up to the last day of Mr. Icahn's "negotiations," the $110 million flight attendant demand remained unchanged. On the last night, he made one move and that was to reduce the concession demand from $110 million to $100 million. No further compromise was forthcoming -- nor has any been made up to today, five years later. These excessive and disproportionate demands led inevitably to a conflict and our workforce found itself with no alternative but to strike on March 6, 1986, to oppose the unilateral implementation of these terms and the probable immediate loss of up to 2,500 jobs.

Although the fight was valiant and flight attendant support was strong -- with 85% of the workforce still honoring the picket line after 72 days -- the union made an unconditional offer to return to work when it became clear that the corporate goal was the wholesale replacement of the workforce. When the strike ended, Icahn refused to reinstate strikers advising them they had been permanently replaced. During the first year after the strike, only 198 strikers were recalled to work.

It was a severe shock to all strikers but especially to the many very

senior flight attendants when they found themselves without a job at the end of the strike. It was not that IFFA had failed to explain the risks involved in being on strike -- it simply was unbelievable to think that the company they had served for 15 to 25 and more years would refuse to take them back after a lawful strike. Even more shocking was the anger experienced when it became clear that, in addition to retaining the newly hired strike replacements, Icahn also intended to reward those very junior members of the workforce who had abandoned the strike and crossed the picket line by allowing them to remain in the job while the more senior employees were left on the street to await recall.

Of the 1,285 scabs who crossed the picket line (crossovers) who were allowed to work after the strike, 1,250 were junior to almost all of those left out of work. Strikers were clearly punished for exercising the right to strike.

The second recall of striking flight attendants began in April 1987, 11 months after the strike ended. It ultimately took three years before the last striker was returned to the job. As you can well imagine, the level of animosity and hostility in the cabin between strikers and scabs was clearly evident to the passengers. The traveling public suffered, the airline suffered and the employee suffered. Such an atmosphere prevents the open communication and spirit of cooperation needed to provide for the safety and service of airline passengers.

Ordinarily when a strike ends, the hardships suffered by the employees, the company and the traveling public likewise end. However

that is not so when crossovers and permanent replacement workers are retained at the end of the strike. In our situation, the agonies lasted three more years. Single mothers with children were forced to sell their homes and move back in with parents; some lost their homes in foreclosures. In other instances, both husband and wife were flight attendants, so both incomes were lost.

By far, the most tragic case was that of flight attendant Frank Fotjik. Frank had flown for TWA for 21 years when the strike took place; he was married with two children, 8 and 9 years old. Frank's inability to regain his rightful employment and the fact that he could no longer provide for his wife and children weighed heavily on him, causing deep depression. Frank would have regained his job back at the end of the strike had the crossovers been removed. Three weeks after the strike ended, when Frank realized that he had no post strike job, he committed suicide. His widow told IFFA that Frank had no prior history of depression. Frank's death is a tremendous loss to his family, friends and TWA.

IFFA filed suit to challenge the new-hires permanent replacement status and force the removal of crossovers by reinstating flight attendants in seniority order. IFFA lost the crossover issue in the District Court but had the decision overturned in its favor by the U.S. Court of Appeal. The U.S. Supreme Court heard this case and in a 6-3 decision issued in 1989 ruled that, after a strike had ended, employers could retain crossovers in preference to more senior full-term strikers. (109 S.Ct.1225)

IFFA lost the issue of hiring permanent replacements in the District

Court and Court of Appeal and the U.S. Supreme Court refused to hear the case.

Our courts have made a mockery of federal statutes regulating and promoting collective bargaining. Congress has specifically protected the right to strike and has specifically prohibited employee discrimination based upon the exercise of that right. It is unlawful, Congress has said, for an employer to discharge or otherwise discriminate against an employee because that employee exercised the right to strike. As illustrated by the IFFA-TWA post-strike litigation, the federal courts have, under the guise of interpretation, effectively repealed these statutes. The courts have in effect said: "We read that Congress has prohibited an employer from discharging or otherwise discriminating against an employee who exercised the right to strike, but we will allow that employer to 'permanently replace' any employee who exercises that right." With all due respect, this is a distinction without a difference; permanent replacement is, by any definition, tantamount to discharge and is clear discrimination on the basis of who did, and who did not, work during a strike. Similarly, employees who are union members, who participate in the collective decision to exercise the right to strike, who commence that strike -- but who thereafter cross a picket line and return to work -- may be rewarded by an employer by being retained in preference to those employees (including more senior employees) who stayed on strike for its duration. Again, and with all due respect, this is judicial approval of the notion that benefits including jobs can be doled out on the basis of the extent of protected union activity. Such

discrimination is contrary to federal labor policy.

After a 96% favorable strike vote, thousands of TWA flight attendants relied on the mutual commitment that we all gave each other when we voted to strike; we relied on that commitment when we all commenced the strike; and we relied on a federal labor policy that prohibited discrimination because of the exercise of that right to strike and the doling out of benefits on the basis of who did, and who did not, exercise what we thought to be a protected right.

We suffered greatly for exercising our right to strike. We should not be forced to suffer this kind of consequence. You have the opportunity to correct this terrible inequity. A union member risks enough by exercising the legal right to strike without also facing permanent replacement. Give us a level playing field.

I thank you for this opportunity to speak on behalf of an issue very dear to me and to airline employees everywhere. The Continental and later the Eastern Airlines situation, and massive permanent replacements that occurred elsewhere, point out that ours is in no way an isolated instance in the airline industry. I urge Members of the Subcommittee to support H.R.5.

I will be happy to answer any questions.

TESTIMONY BY

GEORGE J. KOURPIAS

PRESIDENT OF THE

INTERNATIONAL ASSOCIATION OF MACHINISTS

AND AEROSPACE WORKERS

TESTIFYING ON BEHALF OF THE IAM ON

STRIKER REPLACEMENT LEGISLATION

BEFORE THE AVIATION SUBCOMMITTEE

PUBLIC WORKS AND HOUSE TRANSPORTATION COMMITTEE

APRIL 10, 1991

Mister Chairman, Members of the Committee:

My name is George J. Kourpias and I am President of the International Association of Machinists and Aerospace Workers.

We represent more than one hundred thousand men and women whose collective bargaining agreements are governed by the Railway Labor Act.

On behalf of those employees of airlines, rail carriers and our members in related industries, I want to express my appreciation for this opportunity to discuss with you this critical issue of permanent replacement of striking workers.

The use of permanent strike replacements is a horror story that has been blotting the pages of U.S. history for the past ten years.

We have to go back in time no farther than the Eastern Air Lines tragedy to view that record of shame.

Mister Chairman, I can tell this Committee that if it were not for the use of permanent strike replacements, Eastern Air Lines would be flying today.

I shall skip over the human misery that the Eastern tragedy brought down on tens of thousands of human beings.

Among my own members there have been numerous suicides and fatal illnesses.

Among these victims there have been broken families and broken bodies and spirits. There have been deaths and serious illnesses caused by increases in alcohol and other drug

addiction, deaths attributed to coronary, high blood pressure and other emotionally caused illnesses.

Furthermore, there has been industrial chaos. Workplace democracy was replaced by corporate anarchy.

A moment ago I stated that Eastern Air Lines would be flying today, if it were not for the issue of permanent strike replacements.

It was that issue, and that issue alone, that brought down this carrier that had been operating since 1928--some sixty-two years.

The critical time in the Eastern tragedy came more than one year ago, after Martin Shugrue was appointed by the court to operate Eastern as a trustee.

We invited, we urged Mr. Shugrue to resume negotiations.

I met personally with Mr. Shugrue, as did our union's vice president in charge of transportation, John Peterpaul.

Our purpose in those meetings was to try and end the strike.

To try and save Eastern Airlines.

We thought that the unions and Mister Shugrue could negotiate a settlement.

Mister Shugrue indicated that this was his wish, as well.

However, he told me in our talk that he would not resolve the issue of the permanent replacements.

Without settling that issue, there could be no settlement.

If that issue could have been resolved, the other issues then would have fallen into place.

The provisions of the Railway Labor Act would have worked, as they historically have.

Mr. Chairman, the industrial anarchy I referred to a moment ago continues today. I predict it will get worse.

The situation today on Alaska Air Lines is an example of that type of anarchy.

Alaska Air Lines is a perfect example of a split workforce.

It is now made up of the permanent strike replacements, as well as some strikers--those few who have been able finally to return to work.

Now you have strikers and their replacements working side by side.

You have a partially unionized workforce.

You have litigation beyond description.

You have a real life experiment on how the spirit of the Railway Labor Act is being mocked by a judicial loophole.

Every carrier should be operating for profit, of course. But they also should be operating for the safety and convenience of the travelling public.

How can this latter purpose be accomplished with a divided workforce, riddled as it is with morale problems and internal dissent?

And all because of this judicial loophole.

The loophole to which I refer is the judicially-created Labor Board versus Mackay Company decision.

This 1938 decision has since been amplified in such court rulings as Belknap versus Hale in 1983, and TWA, Inc. versus Flight Attendants in 1989.

Under this curious doctrine, even though it is unlawful for an employer to discharge his employees for engaging in a lawful economic strike, it is lawful for the employer to "permanently replace" such employees.

Truly, this doctrine would stagger the imagination of a George Orwell.

In summary, the Mackay doctrine goes against the federal labor policy's most basic purpose.

It approves of a harsh injustice against working men and women when they exercise their right to engage in concerted and protected union activity.

This doctrine does violence to healthy relations between management and labor, and sickens the otherwise healthy concept of the collective bargaining relationship.

I do not think I am exaggerating when I say that the Mackay doctrine threatens the very foundation of free collective bargaining.

As the testimony of my fellow union representatives notes, over the past decade there has been an unbelievable increase in employer irresponsibility.

More and more employers are now viewing collective bargaining in a new light.

Now they see it, not as a means of re-negotiating wages and working conditions, but as means of overriding their employees' free choice.

They see it as an opportunity to recruit a new workforce of permanent replacements--replacements who are not likely to push for union representation.

So, employers may now change a dispute over a union contract into a battle over the future of a union. And, indeed, over the future of unionized employees.

And when they do that they are doing more than trampling on the Railway Labor Act.

They also are punishing--often permanently--their employees for doing what the federal labor laws say they may do.

This certainly was not and is not now the intent of the Railway Labor Act, or the National Labor Relations Act.

Federal labor policy historically takes into account the fact that an economic strike has limited objectives. It puts only limited economic pressure on employers.

Such work stoppages are temporary. Yet, under the Mackay doctrine, the employer's solution is made permanent.

While employees are seeking the short-term goal of improving their livelihoods--without destroying those livelihoods--employers are given the opportunity to destroy the other party totally.

Clearly, the present situation can not continue.

Or it can continue, and hostility will beget hostility.

It can continue and national labor policy can continue to be held up to ridicule, perverted by the unscrupulous and misused by the unethical.

Mr. Chairman, I know that the responsible element, the majority of this nation--both management and labor--do not want to see this continued irresponsible perversion of national labor relations.

That is why we are testifying today in support of H.R. 5.

H.R. 5 is not an earth-shaking bill. It does nothing new or innovative.

It merely restores the intent of national labor policy as spelled out by both the Railway Labor Act and the National Labor Relations Act.

Its purpose is solely to correct the imbalance of power caused by the Mackay doctrine.

Mister Chairman, we seek no special advantage. We seek only a level playing field.

We seek only a return to the historic function of our nation's labor laws. We seek a return to collective bargaining within the constraints and protections of those laws.

H.R. 5 would restore those protections and maintain those restrictions. I urge this committee to favorably report H.R. 5. I thank you for your attention and for giving us your time.

STATEMENT OF
JAMES E. LANDRY
SENIOR VICE PRESIDENT AND GENERAL COUNSEL OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA
BEFORE THE
SUBCOMMITTEE ON AVIATION OF THE
COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

APRIL 10, 1991

Mr. Chairman, Members of the Subcommittee, my name is Jim Landry. I am Senior Vice President and General Counsel of the Air Transport Association of America. I am accompanied this morning by Frank Berardino, Senior Vice President and Chief Economist of Gellman Research Associates, Inc., and Robert J. DeLucia, Vice President and General Counsel of the Airline Industrial Relations Conference.

On behalf of its 20 U.S. air carrier members, which combined account for over 96% of the passengers and freight carried by air in this country, ATA urges the rejection of H.R. 5, the so-called striker replacement bill. This legislation seeks to amend the federal labor laws to give economic strikers a right to return to their jobs in preference to other employees who elected to work during a strike, thereby permitting the employer to continue operations. In our view, this legislation is unneeded and unwarranted in the airline industry and would disrupt the delicate balance upon which our collective bargaining system is based.

Although ATA often appears before the Subcommittee to testify about matters involving the safety of airline operations, H.R. 5 is not such a matter. This legislation involves economic, and not safety, issues. Our fundamental position is shared by industry, the Administration, Secretary of Labor Martin, Secretary of Transportation Skinner, and many members of Congress.

Clearly, this legislation is special pleading that would overturn a half century of settled and efficacious labor law. The Mackay Radio decision by the Supreme Court in 1938 has been a bedrock principle upon which employees, unions and employers have evaluated their options during a collective bargaining dispute: to accept a settlement, to strike, to operate, or to replace. Those balanced freedoms are at the heart of the federal labor laws and should not be disturbed in response to a unilateral request from one side of the bargaining table after 50 years of legal accord.

The 1938 Supreme Court decision in Mackay Radio was good law at a time when the American labor movement represented fewer units and employees than it did at its peak or does today. Nothing in the employer's right to operate and replace prevented the American labor movement from expanding rapidly and serving its members effectively during the 1940's, '50's and '60's. Nothing in the continuation of the same principle of law is the cause of that movement's numerical decline today. There is certainly no reason to disturb the collective bargaining process by

putting a thumb on the scale that measures the limits of permissible economic self-help during a labor dispute.

In addition to the general deficiencies of this legislative proposal, the particular industrial relations facts of the airline industry, especially collective bargaining under the Railway Labor Act, highlight the shortcomings and unsuitability of H.R. 5. We believe that under the Railway Labor Act ("RLA") there is no factual experience showing that the employees in the airline industry, or the unions that represent them, have been disadvantaged by the long-standing Mackay Radio principle.

Some facts about airline labor relations should help the analysis:

1. Airline employees are highly unionized. It is nearly uniform among larger carriers that pilots, mechanics, and flight attendants have chosen to be represented and are covered by labor contracts. For ATA members, 85% of the pilots are unionized, 82% of the mechanics, and 81% of the flight attendants. Commuter carriers are increasingly unionized as they emerge in a changing industry.

2. Airline employees are highly compensated. We do not believe the case for this legislation can be made on economic grounds, as suggested by its supporters. Data for the airline industry show that the unions do not need the special boost for their bargaining power

that is promised by H.R. 5. Airline unions are doing very well for their members under the law as it is now. Based on U.S. Department of Transportation data, for example, the average annual cash compensation for airline pilots is $92,000. Our industry contracts provide rich benefit and retirement programs.

3. The airline industry has few strikes because the Railway Labor Act's comprehensive system of collective bargaining works. Since 1981, there have been only seven strikes in the airline industry, a remarkable record in view of the hundreds of individual labor negotiations that have occurred during that time frame. The low incidence of airline strikes is the product of the RLA's comprehensive bargaining structure, which encourages the parties to reach voluntary settlements through negotiation and active government-sponsored mediation. If that collective bargaining process is completed without an agreement, the parties are free to exercise whatever peaceful economic power they can muster. From the union's perspective, that includes the unlimited right to strike and bring to bear other forms of economic pressure, and from the carrier's, the right to implement final proposals or to endeavor to continue operations by replacing striking employees. The right to operate and replace strikers is the only effective counterweight

available to a carrier should its employees decide to withhold their labor services. More importantly, the existing parity in the weapons of economic pressure is a catalyst to agreement and a critical factor in the avoidance of strikes. This is an especially important consideration in the transportation industry. The actual exercise of the replacement power is demonstrably rare, since ninety-seven percent of all negotiations under the auspices of the National Mediation Board result in settlements without strikes.

Enactment of this bill would upset the balance of power in labor-management relations in our industry. The effects of the shift would be felt by the travelling and shipping public. Impeding management's right in economic strikes to hire replacement workers could easily force management to capitulate to the demands of labor in circumstances where today they would not. Such a skewing of the collective bargaining process would worsen the already bleak financial situation of the airline industry and ultimately would place financial pressures on airline services, particularly on those services which today are only marginally economical.

Airlines are not in a position to offset the advantages that H.R. 5 would provide to labor. The U.S. airline industry experienced a loss of well over $2 billion last year. No airline has the wherewithal to weather a strike of appreciable duration. Airlines are highly leveraged, capital intensive companies; they cannot

withstand disruptions in their cash flows. Beyond the lost revenues a strike creates, the airline confronting a labor stoppage must consider the lost market share that it will suffer because of a strike. Potential loss of traffic is a very important consideration in the intensely competitive airline industry. Airlines cannot recoup revenues lost in a strike and are apprehensive that they will not be able to recapture traffic lost because of a strike. Indeed, the mere threat of a strike induces passengers and travel agents "to book away" from the threatened airline. Furthermore, the hub-and-spoke systems that characterize airline operations accentuate the threat of a strike, including one targeted at a hub. Selective concerted labor action can have a very disruptive effect on highly integrated airline operations. A small group of workers can shut down an airline, to the detriment of non-strikers and consumers. For these reasons, our industry feels that we must be given the option to continue operations during a strike.

ATA commissioned Gellman Research Associates, Inc. to examine the effects of striker replacement legislation on the airline industry. The Gellman study, copies of which we have submitted to the Subcommittee, points out that airlines share one characteristic with all other service industries: they can not inventory output in anticipation of a strike. This circumstance magnifies the financial jeopardy a carrier faces during a strike.

It must continue to satisfy its fixed obligations, including payments of interest, and long-term debt coming due. In addition, it must pay its trade creditors or

face being cut off from such vital inputs as fuel, aircraft parts and the ability to land at airports. These current liabilities must be satisfied even as the airline operates at a fraction of its former level. Additional cash will be needed to fund the operating deficit from the on-going operations during the strike. Money will be going out much faster than it comes in, which can put the carrier in financial jeopardy quickly.

The Gellman analysis suggests that the increased bargaining power of labor resulting from the proposed legislation would be so substantial that carriers would have little choice but to avoid strikes and transfer resources to their unionized work forces at the expense of both consumers investors and the general public. Under the proposed law, taking a strike, even in the intermediate case, would threaten the survival of an airline.

The study sets forth scenarios which were applied to two of the strongest airlines in circumstances in which they otherwise made substantial profits, and because the scenarios themselves were drawn conservatively, the results obtained are probably optimistic. A carrier entering a strike in a weaker financial state, or subject to substantial productivity losses and further market share erosion due to job actions or other union activities, would fare less well than the two carriers examined by the study. Given these results, the study concludes:

- Carriers are already unlikely to be willing to take strikes; without the ability to replace workers, the threat to the viability of such firms will be so great that they will become even more strike-averse.

- As a result, the balance in labor-management relations in the airline industry will be upset.

- The size of the economic rents already enjoyed by airline workers will grow as a result of this legislation at the expense of consumers, investors in airline companies, and the general public.

- Even if airlines survive strikes, they will emerge as less effective competitors in both domestic and international markets.

H.R. 5 would significantly exacerbate these vulnerabilities. If enacted, it would expose airlines to financial and competitive losses that would magnify the power of labor in collective bargaining. Such government-provided leverage would be wrong. No reason exists to change by government mandate the relative power of labor and management.

We believe that arguments by the proponents of H.R. 5 are particularly without merit when examined in the setting of the Railway Labor Act and the

transportation industries. Observers who know the airline industry's special situation will recognize that the major union themes are inapposite to labor relations in our industry. Consider their four basic contentions.

1. Risk of union ouster. The contention that Mackay too easily leads to union ouster when large scale replacement of strikers occurs are not relevant to the way this industry and its unions operate under the Railway Labor Act. First, the National Mediation Board, ("NMB") does not recognize a decertification procedure and airline employers thus have no administrative procedures available to test a union's continuing majority support. Moreover, if a new union develops among replacement employees, as occurred once at TWA among new flight attendants after a strike, the replaced strikers under NMB rules continue to have voting power indefinitely. Consequently, the union that took the TWA attendants out, en masse, remains the bargaining agent for all of the flight attendants, including the replacements. In these circumstances, it could not be a carrier's objective to cause a strike in order to oust the union that speaks for the replaced employees. This anomaly shows that the current legislation is misdirected against the airline industry.

Proponents of H.R. 5 create a misimpression about current law when they equate a permanently replaced employee with an employee who is discharged. Individuals "permanently replaced" under the law are not terminated and are not barred from employment with the company they have struck. Indeed, they retain preferential

rehire rights as vacancies become available. The Supreme Court has limited the "permanency" of the replacement power by guaranteeing this preferential recall for new openings. Moreover, the employer's right to offer permanent jobs to strike replacements is also limited. If an airline is found to have violated the Railway Labor Act during a labor dispute, a court has the power to order the reinstatement of striking employees notwithstanding the employment of replacements in the work force.

2. The alleged imbalance of legal power. Another union argument contends that the power to replace is greater than the power to strike. This is simply not true under the Railway Labor Act, which does not restrain union secondary boycott activity. Burlington Northern R. Co. v. Maintenance of Way Employees, 481 U.S. 429 (1987). Nor is there any legal restraint on the quickie strike or slowdowns once the NMB's procedures are exhausted. Pan American World Airways v. Int'l. Bhd. of Teamsters, 894 F.2d 36 (2d Cir. 1990). After the exhaustion of NMB procedures, unions possess the power to bring whole systems to a dead stop.

3. The alleged imbalance of economic powers. Another theme in the statements of the proponents of H.R. 5 is the attempt to portray strikers as a class of persons who should be given a virtually risk-free right to shut an employer down. This portrayal assumes that an airline can be shut down without causing the carrier long-term harm. Proponents suggest that the striking employees are only trying to improve their share of the company's earnings and have no intention of permanently disabling or

harming the employer. It is argued that continuing the Mackay rule leaves the employer with more economic power during a labor dispute than the employees, in that the employer's power to reduce the economic circumstances of the striker exceeds the injury that a strike causes the employer. This view depends on both a belief that one side of the table is "the good guy," and on an assumption that a strike of limited duration is something that all employers can and should easily sustain. But in competitive, capital intensive industries, like aviation, with heavy debt for equipment, and with a product or service that cannot be stockpiled or deferred, even a short strike can be permanently debilitating.

The attached executive summary of the study by Geliman Associates dramatically demonstrates why it is crucial for the health and survival of a carrier that it have a meaningful opportunity to continue to operate. The power to hire replacements only works if replacements can have confidence in their future job opportunity. The power to strike and the power to operate and replace create a strategic parity that encourages ultimate, peaceful settlement. They are counterweights to precipitous economic warfare. That is the history of labor relations in our industry.

4. The alleged easy availability of temporary replacements. Hiring replacement workers is a last resort in the airline industry. As a practical matter, ready pools of skilled pilots and FAA certified mechanics simply do not exist for the airline industry. The training and skills needed to serve the public safely constitute such high

standards that there is actually a labor scarcity. Those conditions contribute to the high levels of compensation and the difficulties faced by carriers if they try to find replacements.

In this context, the long-standing Mackay rule is a fundamental protection that the employer needs, in order to balance the unlimited power of the strike. Fortunately, by a combination of RLA procedures, the tradition of good faith bargaining in the industry, and the mutual appreciation of risks, the actual number of times that strikes occur for us is very low and the occasions when permanent replacements have been employed are rare. The arguments from proponents are simply inapplicable to our industry and statute.

Congress has clearly stated in the past that it does not wish to undertake action that would disrupt the balance between labor and management in the airline industry. In Section 416(b)(7)(D) of the Federal Aviation Act, enacted in 1980, Congress authorized the Department of Transportation to allow foreign airlines in an emergency to provide temporary service on domestic U.S. routes -- to enjoy, in emergency circumstances, the otherwise prohibited cabotage rights. However, Congress specifically prohibited foreign airlines from providing replacement service in the case of an emergency caused by a labor dispute, where such a replacement would grant "an undue advantage to any party to such [a labor] dispute . . . ." 49 U.S.C. app. § 1386(b)(7)(D).

This manifestation of Congressional neutrality in labor disputes would be directly contradicted if H.R. 5 were enacted.

Finally, aviation is an industry that serves the shipping and travelling public. Unlike labor disputes in other industries, airline labor stoppages affect more than just the parties directly involved. As the recent National Transportation Policy Statement indicated: "no industry in the nation is more important to U.S. economic growth and international competitiveness than transportation." This national purpose is best served by rejecting H.R. 5.

This appears to be the view of the American public. In a recent poll that Penn & Schoen Associates, Inc. conducted on behalf of the Employment Policy Foundation and the Council on Labor Law Equality, 63 percent of the respondents supported the use of replacement workers during a strike. Only 25 percent of the respondents opposed the use of replacement workers. Furthermore, 54 percent of the respondents opposed firing replacement workers at the end of a strike. Thirty-four percent of the respondents supported firing replacement workers. As these results indicate, there is widespread public support of the use and continued employment of replacement workers.1/

1/ The poll was conducted by telephone between January 19-28, 1991 and involved 1,002 persons. Twenty percent of the respondents identified themselves as union members. The margin of error for the poll results was plus or minus 3.1 percent.

We respectfully urge that H.R. 5 be rejected. Fundamental fairness, an appropriate regard for the balance that has existed between the rights of labor and management since 1938, and a recognition of the needs of the travelling and shipping public should compel that result.

Thank you, Mr. Chairman, for giving us this opportunity to express our views on this critical legislative proposal. My colleagues and I will be pleased to answer any questions you may have.

Gellman Research Associates, Inc.

AN ECONOMIC AND FINANCIAL ANALYSIS OF AIRLINES' ABILITY TO WITHSTAND STRIKES BY LABOR

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April 4, 1991

Prepared for:

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EXECUTIVE SUMMARY

The Air Transport Association of America (ATA) asked Gellman Research Associates (GRA) to evaluate the effects on the airline industry of proposed legislation, H.R.5 and S.55, which would prohibit the hiring of permanent replacement workers during a strike.[1] The two bills (which are identical) would amend the Railway Labor Act and, in effect, overturn the 1938 U.S. Supreme Court decision in NLRB v Mackay Radio & Telegraph Company which established the so-called Mackay Doctrine. In this decision, the Court drew a distinction between "unfair labor strikes"--where a strike is caused by unfair labor practices--and an "economic strike"--where no unfair labor practices are present. In an "economic strike," workers are entitled to be reinstated only as positions become available after the strike is over. In "unfair labor strikes," however, workers are entitled to reinstatement. The proposed legislation would extend the reinstatement rights workers enjoy in "unfair labor strikes" to all types of strikes. In other words, under these two bills, workers could not be permanently replaced regardless of the duration or nature of a strike.

GRA's assignment was to evaluate the effects of this new legislation on the airline industry. In particular, GRA was asked to focus on two issues:

- The effects on the economics of the airline industry;
- The effects on the ability of carriers to sustain operations during an ongoing strike.

The discussion of the first issue (covered in Chapter 2) examines what the overall consequences of the legislation will be with regard to economic efficiency, prices and competition in the markets for airline services. The analysis draws upon economic theory and available evidence in the economics literature in reaching conclusions.

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1. Other provisions would afford this benefit to other workers through modification of the National Labor Relations Act.

The issue of how long carriers can sustain a strike under the new legislation is addressed in Chapter 3. GRA built a detailed financial model for two of the strongest U.S. carriers based upon their actual financial performance in 1989. (The identities of the carriers whose financial data are employed are not disclosed but one of the carriers is among the world's largest and the other is smaller but consistently among the industry leaders in rates of return and other measures of financial health.) In the model, actual performance is influenced through the use of various assumptions about the duration and effectiveness of strikes by pilots under two conditions:

- o Existing laws;
- o The proposed legislation.

Following is a summary of our conclusions.

Effects of the H.R. 5 and S. 55 on the Economics of the Airline Industry

Evidence in the economic literature indicates that unionized employees in the airline industry are highly paid relative to individuals employed in comparable occupations. Several authors conclude that these high wages are attributable to the substantial bargaining power that unions in the industry enjoy. Thus, it appears that airline employees are well advantaged in the current labor-management environment. The proposed amendment to the RLA will further strengthen the bargaining position of unions, thus creating even higher relative wages and increased economic rents earned by airline employees.

The burden of higher wages will be borne largely by the flying public and consumers in general, as air carriers will be forced to pass on higher labor costs by way of increased fares. In the future, the proposed amendments will have the effect of allowing workers to capture a large share of the benefits associated with technological progress, at the expense of the flying public and consumers in general.

Since higher wages will result in reduced employment in the industry, individuals who would otherwise find employment at airlines and their suppliers also will share the burden associated with the proposed amendment. The alternatives for these individuals will be employment in less desirable jobs, or in the worst case, unemployment. As a result, the proposed amendment will favor one group of employees over others.

The proposed amendment to the RLA will cause wage rates in the airline industry to exceed, by an even larger margin, the rates that would prevail in competitive markets. This will cause airlines to reduce output below the socially optimum level, thus generating inefficiencies associated with a misallocation of resources.

Evidence in the economic literature indicates that reduced competition in the airline industry results in higher air fares. By placing additional financial stress on air carriers, the proposed amendment may push more carriers towards financial instability or bankruptcy, thereby reducing competition and causing service losses in selected market segments. Several carriers are currently operating under severe financial stress, and consequently, are especially vulnerable to even marginal increases in labor costs. The proposed legislation also would harm the competitive position of U.S. carriers in international markets.

Effects of H.R. 5 and S. 55 on the Ability of Carriers to Sustain Operations During an On-Going Strike

This study also presents the results of an analysis of two of the strongest U.S. carriers--one large and one small--operating in 1989 assuming that these carriers endure pilot strikes. The purpose of this exercise is to understand how long such strong carriers can remain financially viable under the various circumstances posited in the strike scenarios. It is particularly important to develop some understanding of the degree to which carriers are placed in jeopardy as a result of the proposed legis-

lation (H.R. 5 and S. 55) which would effectively prohibit the permanent replacement of airline workers during labor disputes.

Some important features of airline labor disputes that were not considered are:

- o Reduced productivity due to the effects of picketing on carrier business and on the productivity of workers.
- o The substantial diseconomies that may be experienced when operating at less than normal capacity.

With regard to the latter issue, GRA attempted to identify those costs that would be truly avoidable during a strike; inevitably there are some costs that would be avoidable in part, and others that would not be avoidable at all. Whenever faced with a decision about a particular cost category, GRA erred on the side of assuming that the firm could avoid costs. The result is that in GRA's scenarios, airlines may exhibit greater financial durability than actually may be the case.

In the financial analysis, GRA developed three scenarios. The first replicates the conditions that existed during the United Airlines pilots' strike in 1985. At that time, the carrier estimated that it could have completely rebuilt its system within 11 months by hiring replacement workers and by utilizing those pilots who crossed picket lines. GRA examines how two financially strong carriers operating in 1989 would have fared under these conditions.

GRA then examined two scenarios assuming the proposed legislation becomes law. Again, the basic assumptions are based upon the actual circumstances of the pilots' strike at United in 1985; however, to replicate the effects of the legislation, no replacement workers are assumed to help the company rebuild. The two scenarios under the proposed legislation are distinguished from the United situation by applying the following assumptions:

- o Worst Case Scenario: The struck carrier would be able to fly only that percentage of its capacity that United was able to get into the air without substantial worker cross-over during its strike in 1985.
- o Intermediate Case Scenario: The struck carrier would slowly rebuild itself using only pilots who would gradually cross picket lines over a 21 month period.

Conclusions Concerning the Ability of Airlines to Survive Strikes

Airlines share one characteristic with all other service industries: they can not inventory output in anticipation of a strike. This circumstance magnifies the financial jeopardy a carrier faces during a strike.

It must continue to satisfy its fixed obligations, including payments of interest, and long-term debt coming due. In addition, it must pay its trade creditors or face being cut off from such vital inputs as fuel, aircraft parts and the ability to land at airports. These current liabilities must be satisfied even as the airline operates at a fraction of its former level. Additional cash will be needed to fund the operating deficit from the on-going operations during the strike. Money will be going out much faster than it comes in, which can put the carrier in financial jeopardy quickly.

Some important trends emerged from our analysis of strike scenarios:

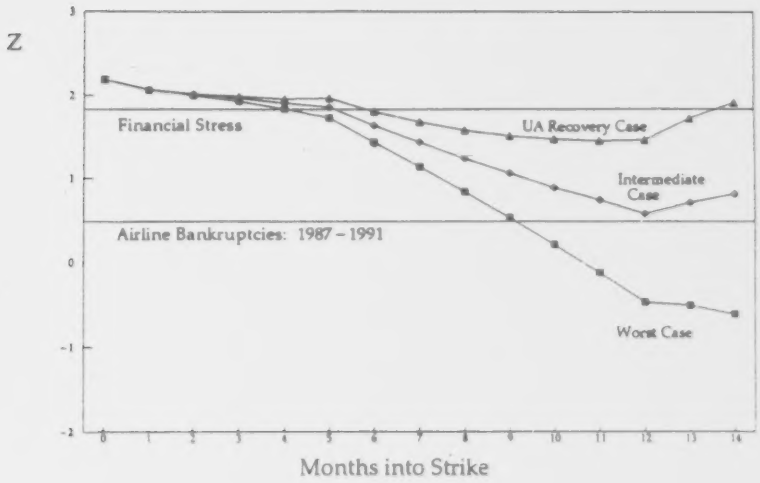
- Strikes under the present law are costly and threaten airline viability: Both airlines run out of cash after a four-month pilot strike assuming the United Airlines 1985 scenario. This means that these carriers would have be borrow between 15 and 32 percent of their net worth in order to survive such a strike. Both firms would experience substantial financial stress even under present labor laws. Our analysis indicates that these carriers would have a good chance of surviving, however.

- Neither carrier would be likely to survive a worst case scenario under the new legislation: Both carriers would run out of cash within four months. A bankruptcy model predicts that there is a substantial likelihood that the large airline would be bankrupt within nine months, while the smaller carrier would be bankrupt within ten months. Both carriers would have to borrow a majority of their net worth to stay in business even that long, creating a substantial incentive for stockholders to pressure the companies to sell off assets, and perhaps shutdown to preserve net worth.

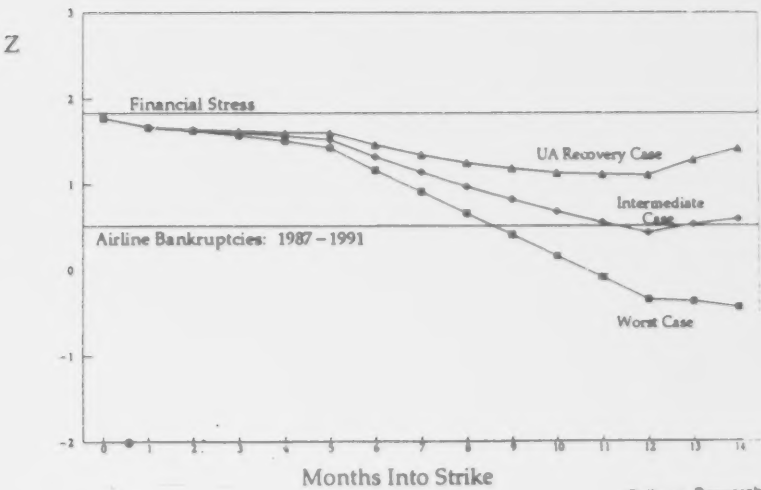
- The results for the intermediate scenario under the new legislation suggest that a strike of long duration would be likely to bankrupt both carriers: Again, each airline runs out of cash within four months. A bankruptcy model suggests that it is likely that the large airline would be insolvent within one year at which point it would have borrowed at least 50 percent of its net worth to remain in business. The smaller airline would approach bankruptcy in the 12th month and would have borrowed 28 percent of its net worth to survive.

Figure ES.1
Summary Results of Impacts of Strike on Airline Finances Under Three Scenarios

Small Airline



Large Airline



Gellman Research Assoc. Inc.

The results of the three scenarios are summarized in Figure ES.1 which presents the results of a bankruptcy model utilized in the analysis.[2]

These results suggest that the increased bargaining power of labor resulting from the proposed legislation would be so substantial that carriers would have little choice but to avoid strikes and transfer resources to their unionized work forces at the expense of both consumers investors and the general public. Under the proposed law, taking a strike, even in the intermediate case, would threaten the survival of an airline.

Conclusions

It is important to note that the results of these scenarios are subject to the assumptions made. Because the scenarios were applied to two of the strongest airlines in circumstances in which they otherwise made substantial profits, and because the scenarios themselves were drawn conservatively, we believe that the results obtained are probably optimistic. A carrier entering a strike in a weaker financial state, or subject to substantial productivity losses and further market share erosion due to job actions or other union activities, would fare less well than the two carriers examined here. Given these results, GRA concludes:

- Carriers are already unlikely to be willing to take strikes; without the ability to replace workers, the threat to the viability of such firms will be so great that they will become even more strike-averse.
- As a result, the balance in labor-management relations in the airline industry will be upset.
- The size of the economic rents already enjoyed by airline workers will grow as a result of this legislation at the expense of consumers, investors in airline companies, and the general public.
- Even if airlines survive strikes, they will emerge as less effective competitors in both domestic and international markets.

2. The bankruptcy model produces a "Z score" which captures the key financial ratios from a firm's income statement and balance sheet and predicts "financial stress" and/or bankruptcy. The model is described in Chapter 3 and Appendix B.

Under current law, strikes are few in number and most often of short duration. The field is balanced in that both employees and employers incur significant and long lasting costs during and after a strike. Therefore, while the potential losses from a strike tend to discipline the bargaining positions of both sides, the strike alternative can be employed if conditions warrant. Under the proposed legislation, however, a strike would threaten the survival of even the strongest carrier. The airlines, which already pay wage premiums to their workers, will be less able to resist union demands. The balance inherent in the current situation will be lost and consequent costs will be borne by carriers, air passengers, shippers and the general public.

STATEMENT OF GEORGE LEITZ
INTERNATIONAL PRESIDENT, TRANSPORT WORKERS UNION
OF AMERICA ON HR-5
BEFORE THE HOUSE COMMITTEE ON PUBLIC WORKS
AND TRANSPORTATION

Good morning, my name is George Leitz and I am International President of the Transport Workers Union of America. I am testifying today on behalf of the 50,000 members of our Air Transport Division in favor of HR-5. Like my brothers and sisters in the Air Line Pilots Association and International Association of Machinists, I only wish this legislation had been considered and passed before the tragic confrontation at Eastern -- a catastrophe which I strongly believe would have been averted if the Company had not been afforded the option of permanently replacing its striking employees.

The key principle of the Railway Labor Act -- the law which governs labor relations in the airline industry -- is that both management and labor are obliged to make every reasonable effort to make and maintain agreements. The basic question before Congress is whether resort to permanent replacements by an Employer facilitates or undermines the making and maintaining agreements between parties to a labor dispute. Logic and experience tell me that permanent replacements of strikers inevitably turns a disagreement over wages and working conditions into a destructive and bitter struggle for survival.

In my own experience, strikes are difficult and emotional situations. However, whatever frustration and anger I may feel at

the tactics or bargaining stance of an Employer is tempered by my recognition that I cannot achieve the aspirations of my membership for a better life if I conduct bargaining or a strike in a fashion designed to destroy the Company.

Unfortunately, because it has the legal option of permanently replacing striking workers, a Company may conduct bargaining in a manner designed to provoke a strike in order to give it the opportunity to rid itself of a Union. In my view, the managements of Eastern, Greyhound, and the New York Daily News all bargained with the destruction of the Union as their chief aim and the fact that the law allows for this opportunity eliminated all possibility of compromise. This was clearly a significant factor in creating the totally destructive bargaining environments which led to the bitter strikes at these companies.

To be sure, sometimes the Employer miscalculates and ends up destroying itself in the process of destroying its Unions, as was clearly the case with Eastern. Unfortunately, I have little confidence that the management community has learned much from the Eastern tragedy, particularly given the vehemence with which they are fighting to preserve this economic weapon.

The position of corporate America, as well as the Bush Administration, on this issue is all the more troubling in that permanent replacement of strikers represents the exact opposite of the direction in which we must travel if labor and management are

to form new cooperative relationships to deal with threats posed by foreign competition. I have been told by three consecutive Secretaries of Labor, as well as by many CEOs, that the old autocratic adversarial system of labor relations must give way to a new system -- one which stresses common interests and cooperative endeavor. Indeed, the TWC has sought to negotiate for greater worker autonomy and authority a means for establishing cooperation.

However, it is difficult for me to believe that either the management community or the administration is serious about these goals, when they insist on perpetuation of the right to permanently replace workers exercising their legal right to withhold labor. Permanent replacement of workers is the ultimate in adversarial labor relations. If we are ever to move towards a more progressive, constructive system of industrial relations, elimination of the right to permanently replace striking workers must be one of the first reforms.

BEFORE THE SUBCOMMITTEE ON AVIATION
HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

PERMANENT REPLACEMENT WORKERS

APRIL 10, 1991

TESTIMONY OF
JULIETTE D. LENOIR, NATIONAL VICE PRESIDENT
ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO

Chairman Oberstar, Members of the Subcommittee:

Thank you for this opportunity to testify at this important hearing on H.R. 5, a bill to amend the National Labor Relations Act and the Railway Labor Act to prevent discrimination based on participation in labor disputes. My name is Juliette D. Lenoir and I am the National Vice President of the Association of Flight Attendants, AFL-CIO. I am here today on behalf of the 30,000 flight attendants we represent at 18 U.S. carriers to discuss how vitally important it is to pass H.R. 5.

Members of the Subcommittee, if you had described to me in 1973, the year I started my career as a flight attendant at Allegheny Airlines (now USAir), not only what the airline industry would look like nearly 20 years later but also how airline managements' would behave nearly 20 years later, I would have been skeptical and surprised. Even in my most imaginative moments, I would not have dreamed that the industry would change so much in such a short time.

Similarly, I would bet that if we could have asked the Supreme Court in 1938, when it ruled in NLRB v Mackay Radio and Telegraph Co., whether it believed that companies would be so willing to permanently replace loyal employees in order to silence their collective voice, that it too would have been skeptical and

surprised. In 1938, such management practices were unheard of and such action would have been viewed as unacceptable conduct by the general public. And yet, in 1991, we are faced with a new breed of management, which is much more willing to risk destroying their company by replacing dedicated and trained workers than to work through the negotiation process to reach fair and equitable work rules and levels of compensation. This new breed of management has overloaded its corporate coffers with debt is therefore obsessed with making money. Workers are just replaceable commodities to them. Because of this mindset, our country languishes behind other nations in the global marketplace. That is why is it crucial that Congress pass H.R. 5.

At the Association of Flight Attendants, we have experienced first hand, managements' threat of permanently replacing workers and managements' making good on that threat. Both experiences, as well as watching management play its ruthless and greedy game at other airlines with other workers, has had a tremendous psychological effect on us as union members. It is now widely believed that employers are very willing to hire permanent strike replacement workers. This belief has increased my colleagues' fear of being permanently replaced if we strike. This perception has made "the strike" a much less effective tool for labor and has eroded the bargaining power of unions. Senator Howard Metzenbaum (D-OH) succinctly expressed this point when he said,

"The ability to hire permanent replacement workers has threatened the entire collective-bargaining system and created undue hardship on workers and their communities. Simply put, hiring permanent replacements transforms every labor dispute into a bitter struggle for economic survival." A struggle which the workers and their communities are doomed to lose.

Although most labor unions mark the 1981 action of former President Ronald Reagan, when he fired 12,000 striking members of the Professional Air Traffic Controllers (PATCO), as the contemporary beginning of the use of permanent replacement workers, AFA workers were first threatened five years earlier. In 1976, our members at Alaska Airlines were forced to go on strike. Twenty-three days into the strike, flight attendants received the first letter from management threatening that striking flight attendants would be permanently replaced. At the time, we believed this action would be illegal. Afterall, as union members, we have the protected right to strike. We could not be fired for exercising our right to withhold our labor. How could it be legal to be permanently replaced? Either way, the worker is out of a job.

We quickly learned about the Mackay decision and in realizing that the flight attendants could be replaced legally, signed a back to work agreement two days later. While what we signed was a reasonable agreement, clearly we had been "punished" for

striking and had to accept some less than desirable provisions. [It is interesting to note that the striking pilots were also threatened with permanent replacement. Their back to work agreement with the carrier included a no strike clause. In order to secure continued employment, they had to agree to accept this clause.] The most significant affect of the threat of permanent replacement workers was that it gave the company the upper-hand. Flight attendants feared losing their jobs and quickly returned to work.

The Alaska Airlines saga did not end when the flight attendants returned to work. That same year, Alaska's management started training its clerical staff, supervisors and passenger service coordinators through FAA approved programs to qualify as flight attendants. As each contract deadline approached, more support staff was trained. It became clear that Alaska would be prepared for the next round of collective bargaining by having permanent replacement workers ready. Its support staff was FAA qualified and kept current.

I ask each Subcommittee member how you would feel knowing that, although you could not be fired from your positions, there was a trained group of employees ready to "replace" you at a moments notice. Certainly it shows a total lack of respect for your work and the job you perform. Your years of experience and training and loyalty and dedication to your job would mean absolutely

nothing. How would you feel? Would you constantly be watching your back? Would it be harder to fight battles? Could you remain loyal to your company? This is what the flight attendants at Alaska Airlines faced (and continue to face today as they sit down at the negotiating table) on a daily basis.

In July of 1984, AFA and Alaska Airlines exchanged Section 6 opening proposals. Less than three months later, AFA applied for mediation, which began in December. In February of 1985, the company started to train replacement flight attendants and required them to sign a document as a condition of employment. Essentially, the document said that the employee would cross any picket line and would refrain from union activity until mid-March. The company trained 125 replacement workers. During the same month, the Company mailed the first of a number of letters to all flight attendants encouraging them to cross any picket line and threatened any flight attendant who did not cross the picket line and report to work with permanent replacement. On March 4, 1985, Alaska Airlines machinists union went on strike. Separately, AFA's members announced that they would not cross th machinists' union picket line. The following day, the airline announced it was accepting applications for permanent flight attendant positions in full page newspaper advertisements.

On March 7th, surprised by the incredible solidarity of the flight attendants, Alaska Airline's management began training 43

former Wien Airlines flight attendants and other former flight attendants in 18 hour training classes. (The carrier received an FAA waiver to reduce the training to this 18 hour minimum.) These trainees received pay during training, which was previously not done, and were considered "permanent employees." They were promised that they would not be furloughed, received super-seniority and were paid top wages. The group started working a few days later, "permanently replacing" flight attendants not reporting to work. Replaced flight attendants were directed by management to return their uniforms and pick up their last paycheck.

It would be irresponsible if I did not take a moment to point out to the Subcommittee the safety factor in the permanent replacement issue. As you know, flight attendants are trained safety professionals. We play a vital safety role on the aircraft. How qualified could a replacement worker be after only 18 hours of training and no experience? Some of the replacement workers had never worked as flight attendants before, while others were familiar with other aircraft beside those in the Alaska fleet. Would these new employees be able to evacuate a plane or help a sick or injured passenger? It is crucial that Congress considers the safety factor in this issue.

More replacement workers were trained and started work. On March 16th, less than two weeks after AFA members honored the

machinists' picket line, AFA reached a tentative agreement. Included in the agreement was the first two-tiered wage scale and a back to work provision that assured that all flight attendants would return to work by May 1st on an "as-needed basis." Although more junior flight attendants had to wait until as late as May 1st to return to work while the 90 "replacement workers" continued to fly trips, they did eventually return to work. The tentative agreement was ratified on March 18th. It is important to note that newly trained flight attendants who did not cross the picket line during the support strike were paid substantially less as "B-scalers" than their "replacement worker" counterparts who were receiving "A-scale" wages. By this action management made it very clear that it would "reward" employees who crossed the picket line and actively worked against those who stood unified in support of their principles.

In the end, the threat and use of permanent replacement workers poisoned the collective bargaining process. It threw the entire negotiating process, a process of checks and balances, off and changed the entire atmosphere. Flight attendants began questioning whether they should cross the picket line and save their jobs. It was a very divisive and effective tool for management. Even some committed union members crossed the picket line. It was clear that management was attempting to weaken and destroy the collective voice of the flight attendant. Alaska Airlines management was not bashful in their efforts. In fact,

they were utterly blatant that they would do everything they could to protect the carriers interest, including training and hiring permanent replacement workers.

Management tactics at Alaska Airlines have not changed since the 1985 strike. Almost two years ago, a year before contract negotiations were to begin again, Alaska Airlines management qualified its secretarial pool as flight attendants. Almost 200 secretaries have attended two five week classes with one day's experience on an airplane and are now FAA qualified as flight attendants. The company is keeping them current. When asked, management proudly states that in order to remain in a position to continue operations if a strike or support strike occurs, they will train permanent replacement workers. Imagine what it is like for a flight attendant to work a flight while the person who could permanently replace her/him trains on the same flight.

The ugly specter of permanent replacement workers deeply affects our members and all workers. Suddenly our negotiating committee goes to the table to begin negotiating for an improved contract with an added dread. Pushed to the wall from the start with the knowledge that trained permanent replacement workers are ready at any time. It is an indication that management has no real incentive to reach a fair and equitable agreement. It is an indication that management has no incentive to value its current workforce and therefore can simply concentrate on how quickly

they can be replaced rather than bargain in good faith. Again, the atmosphere is poisoned from the start and management has an unfair advantage.

The enactment of H.R. 5 will bring back fairness and equal footing in labor negotiations. As AFL-CIO President Lane Kirkland has stated, "The enactment of this measure would enhance the prospects of cooperation, by reinforcing the proposition that the best way to resolve differences is across the bargaining table, in a mutual effort to reach a conclusion that represents a mutually acceptable solution to the many problems that arise in the day to day and ongoing relations between workers and employers." Labor's strength is in negotiation not strikes. It is not in anyone's best interest to force a strike. It is in both party's best interest to negotiate a compromise and continue working. Yet, without the ability to strike and then return to our jobs when a solution is reached, labor's strength is weakened at the bargaining table.

In closing, and with apologies to Theodore Roosevelt, "The things that will destroy America are prosperity at any price, safety first instead of duty first and a love of soft living and a get rich-quick theory of life. This country will not be a permanently good place for any of us to live unless it is a reasonably good place for all of us to live. Americanism is a question of spirit, conviction and purpose not of [corporate]

greed or birthplace."

On behalf of AFA, I urge you to support H.R. 5 and restore a level playing field to labor-management relations in this country. Members of the Subcommittee, thank you again for allowing me to testify today on this issue. We must equalize the playing field now and restore dignity to the labor of loyal, dedicated and hardworking Americans. I will be pleased to answer any questions you may have.

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Testimony of

Edward E. Potter
President

Employment Policy Foundation

and

Daniel V. Yager

McGuiness & Williams

before the

Aviation Subcommittee of the

House Public Works and Transportation Committee

on H.R. 5

April 10, 1991

The Foundation's policy research on legislation to overturn the 1938 Mackay decision finds that, contrary to the contentions of the proponents, Mackay replacements have been used consistently and at about the same low level for 53 years, and there is no evidence of any increase in their use in the 1980's. The use of Mackay replacements was contemplated by the authors of the NLRA and was necessary to the Mackay decision of the Supreme Court. A balance of legal rights, e.g., protection against anti-union acts, not a balance of economic power, is what is contemplated by our Nation's labor laws. When a union uses its "right to strike," the law allows the employer the "right to operate" using Mackay replacements. The policy has been in place for over a half a century and only now is being questioned. Indeed, Congress has incorporated the doctrine by reference in amendments to the NLRA in 1959 and courts have followed it in cases under the Railway Labor Act. Finally, not only do the United States' economic competitors reject Mackay, they reject our entire labor law system.

Further, there is no public support for this legislation. Fully, 73% percent of the public say unions have enough or too much power, and by a 2 to 1 margin (64% to 28%), Americans say that they do not want Congress to do more to protect labor unions. By 63% to 23%, the public supports the right of companies to operate during a strike with replacement workers. Moreover, the public opposes firing replacements at the end of the strike, 54% to 34%.

STATEMENT OF EDWARD E. POTTER AND DANIEL V. YAGER

Before the Aviation Subcommittee
Public Works and Transportation Committee
U.S. House of Representatives

April 10, 1991

I am Edward Potter, president of the Employment Policy Foundation. With me today is Daniel Yager of the law firm of McGuiness & Williams. The Foundation appreciates the Committee's invitation to present to you its findings regarding the merits of H.R. 5 which would overturn the Supreme Court's 1938 decision in NLRB v. Mackay Radio & Telegraph Co.

The Foundation is an educational foundation established in 1983 to assist policymakers and the public in understanding the implications of employment policies being formulated by the courts, governmental agencies, and legislative bodies. The Foundation's publications, policy studies, and training programs provide in-depth explanations of the background, applicable law, social and economic factors, and practical considerations, which should be taken into account in both the development and implementation of employment policy. Affirmative action, comparable worth, compensatory and punitive damages, cost studies of employment legislation, cultural diversity, disability discrimination, drug testing, employee selection, immigration, labor law reform, plant closing notification, and whistleblowing are all examples of issues studied by the Foundation.

In 1990, the Foundation published Has Labor Law Failed? by Daniel Yager. The monograph traces the history of Congressional oversight and proposals to amend the NLRA and Railway Labor Act

over the past two decades, including the proposal now found in H.R. 5 to overturn the Mackay decision. As Associate Minority Counsel and Minority Counsel for the House Education and Labor Committee from 1983 to 1988, Mr. Yager performed the Republican staff work for a number of the hearings and legislative bills discussed in Has Labor Law Failed?.

Subsequently, the Foundation asked Mr. Yager to conduct research for a policy paper assessing the merits of the arguments made by the proponents of H.R. 5. This resulted in the Foundation's recently released policy paper, entitled Loading the Scales: The Proposal to Overturn the Mackay Doctrine, the findings of which will be described to you in a moment. In addition to conducting this policy analysis of the striker replacement legislation, the Foundation in conjunction with the Council on Labor Law Equality (COLLE) sponsored a national poll conducted by the Penn & Schoen Associates, Inc. in January 1991 on several labor law issues related to the striker replacement legislation. Penn & Schoen is a highly regarded New York and Washington, D.C. survey research firm that has performed similar studies for the AFL-CIO and its member unions. The poll's results will be presented at the end of our testimony.

We respectfully submit a copy of the policy paper and the entire public opinion poll as part of this testimony for the hearing record.

Foundation Striker Replacement Study

The Foundation's policy paper on the striker replacement legislation examines the various arguments offered in support of overturning the so-called Mackay doctrine. A number of these have been accepted at face value by the media and policymakers with few attempts thus far to undertake a closer examination. The study attempts to fill that void.

As the Committee knows, the Supreme Court held in NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938)--a case under the National Labor Relations Act (NLRA)--that employers can maintain operations during a strike by hiring workers who do not have to be fired at the end of the strike to make room for the returning strikers as long as the strike is not caused or prolonged by labor law violations by the employer. Although NLRA precedent is not necessarily controlling in situations governed by the Railway Labor Act, the courts, including the Supreme Court, have followed Mackay in airline and railroad disputes.

The Mackay doctrine draws a distinction between unfair labor strikes, where a strike is caused or prolonged by unfair labor practices committed by the employer, and economic strikes, where no such unfair labor practices have occurred. In the case of an unfair labor practice strike, the employer, among other things, is required to terminate any replacements that may have been brought in during the strike in order to reinstate the strikers into their former positions. In addition, back pay is owed to those strikers for the period following their unconditional offer

to return to work.

However, in the case of an economic strike, where the employer's hands are clean, the strikers must only be reinstated to the extent any openings exist after the strike is over. This entitlement to reinstatement is retained until the striker has gained regular and substantially equivalent employment. As has been noted by one expert on the Mackay doctrine, there is in most such cases a "not insignificant" prospect that such reinstatement will ultimately take place.[1]

The ability of employers to maintain operations during a strike provides important leverage at the bargaining table. If unions were able to deprive employers of this protection, they would have a virtual hammerlock on negotiations. They would also be much more willing to strike and sustain longer strikes. Thus, there is a heavy burden of persuasion on those who propose to dislodge this fundamental precept of our collective bargaining system.

The study carefully examines a number of the contentions offered in support of overturning the Mackay doctrine:

The "unused option" contention. It is claimed that, until the 1980's, employers rarely, if ever, hired Mackay replacements. To test this proposition, Foundation researchers looked up every

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[1]Estreicher, "Strikers and Replacements," 3 Lab. Law. 897, 901 (1987). The phrase "permanent replacements"--which has become a term of art in labor law parlance--is actually a misnomer since economic strikers are not permanently frozen out of their positions. Thus, instead of using the phrase "permanent replacements", the phrase "Mackay replacements" is used in the Foundation study as well as this testimony.

NLRB case in which the Mackay decision was cited--over 500 cases --and read each of those cases to determine whether Mackay replacements had actually been hired. The results showed that the use of Mackay replacements is hardly a phenomenon of the 1980's. Two-hundred fifty-one of the cases involved Mackay replacements--all but 22 occurring prior to the 1980's. The trend of these cases through the years since 1938 are shown in Figure 1 of this statement. You will note that the use of Mackay replacements has remained at about the same level for the last 50 years.

While not all strike replacement cases end up being reported in an NLRB decision citing Mackay, contrary to the proponents' contentions, it is clear that Mackay replacements were hired on a limited but steady basis prior to the 1980's, which leads to the next contention offered in support of H.R. 5.

The "standard practice" contention. Just as it has been asserted that strike replacements were never hired prior to the 1980's, it is similarly claimed that, since the 1980's, the hiring of Mackay replacements has been standard practice. Yet, data in recent years shows that, apart from a few highly publicized cases, strike replacements are anything but standard. A General Accounting Office study requested by the bill's proponents shows that, in 1985 and 1989, Mackay replacements were hired in only 17% of all strikes. More significantly, this only affected 4% of all strikers in 1985, dropping to 3% in 1989. Moreover, the GAO data does not reflect the number of instances

in which those strikers were ultimately reinstated as part of a strike settlement, an NLRB order, or where vacancies occurred after the strike.

Both the Foundation study as well as the GAO study lead to one conclusion: since 1938 employers have had occasion to resort to hiring Mackay replacements on a consistent, albeit low level. This suggests that the need to preserve that option is clear. Yet, the use of the option is not so widespread as to diminish the strength of the strike weapon or to result in widespread economic dislocations.

The "union-busting" contention. Employers are accused of using Mackay to get rid of their unions by being obstinate at the bargaining table in order to provoke a strike which then allows the workforce to be replaced. If it seems that such an approach by an employer should be made illegal, it is. One of the most basic obligations under our labor laws is the requirement that both the employer and the union bargain "in good faith" which, according to one of the NLRB's earliest rulings

> . . . must mean more than mere negotiation. It must mean negotiation with a bona fide intent to reach an agreement if agreement is possible.[2]

An employer who bargains with the intent of not reaching an agreement and forcing a strike in order to replace the unionized workforce violates section 8(a)(5) of the NLRA and will be required to reinstate the strikers with backpay. Thus, an employer who engages in a bargaining strategy to provoke a strike

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[2]Atlas Mills, 3 NLRB 10, 21, 1 LRRM 60 (1937).

and replaces striking employees will double its personnel costs--it will be required to pay the strikers after already having paid the replacements. These costs can be substantial as illustrated by the recent $10 million backpay liability owed by Colt Industries.

The logical inference of the "union replacement" contention is that the NLRB or the courts are somehow failing to do their job in determining whether employers are failing to bargain in good faith. However, an examination of the case law involving strike replacements indicates just the opposite. Figure 2 shows that, among the Mackay cases examined in the Foundation study, a substantial number resulted in a determination that the strike was an unfair labor practice strike and the strikers were ordered reinstated. This clearly demonstrates that there is no lack of hesitancy on the part of the Board in ruling against the employer. Although the Railway Labor Act operates somewhat differently than the NLRA, in practical effect the results are the same.[3]

Meanwhile, the "union avoidance" argument also underestimates the significant obstacles in the path of any employer which chooses to exercise the Mackay option. In

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[3]Thus, the question of whether either party has acted in bad faith is resolved by the courts and not the National Mediation Board. The courts in determining whether there has been bad faith under the RLA rely heavily on NLRB precedents. Actions taken in bad faith entitle the aggrieved party to injunctive relief and the failure of a party to bargain in good faith delays the ability of the parties to engage in self help measures. And the collective bargaining agreement itself can only be terminated after the major disputes procedures have been exhausted.

addition to the risk under the NLRA of the cost of having a strike deemed an unfair labor practice strike--which can occur even when the employer is bargaining in good faith--an employer must contend with numerous other hardships:

- o the costs of training and "breaking in" a new workforce--costs which escalate depending upon the skill level of that workforce;
- o the impact of a "corporate campaign" or other tactics designed to impose pressure on the employer's customers or suppliers;
- o the spotlight of publicity which usually attends replacement attempts involving large numbers of workers;
- o the risk of being unable to operate effectively even with a workforce of replacements, thus resulting in bankruptcy or sale of the business; and
- o the labor violence associated with any attempt to maintain operations during a strike, whether Mackay or temporary replacements are used or not.

The highly publicized recent examples of the use of strike replacements--under both the NLRA and the RLA--have illustrated one or more of these hardships. Therefore, it is hardly surprising that only 3 in 20 struck employers choose to even attempt the Mackay option. Indeed, such hardships collectively add to the strength of the economic weapon of the strike.

The "everybody else does it" contention. It is claimed that virtually all of our economic competitors prohibit the replacement of strikers and this should be used as a model for American law. Most parents will recognize this refrain as a familiar one. The point is that most other countries not only reject Mackay, they reject our entire industrial relations system, which is heavily enmeshed in our economic and social fabric. If we wish to simply emulate these other countries, why not consider some of their other laws, such as:

- allowing more than one union representing employees performing the same work (France, Italy, Germany);
- broad judicial authority to enjoin strikes (the Netherlands);
- conversion into an illegal strike whenever picketers use intimidation as a tactic (Germany);
- the requirement of a strike vote prior to a strike, which, in some countries, must be by secret ballot (United Kingdom);
- a prohibition against a strike being severe enough to "grievously wound" a company (Germany);
- an absence of any requirement that management and the union try to reach agreement (France); and
- absolute ineligibility of strikers for unemployment benefits (all European and Scandinavian countries)?

Meanwhile, a study of the Canadian experience,[4] comparing experience in provinces which prohibit the use of strike replacements with those which do not, concluded, based upon a statistical analysis that, among ten policy variables, legislation prohibiting the hiring of replacement workers had the most significant effect on increasing both the incidence of strikes and their duration. It is worth noting that the policy having the most significant effect on reducing the incidence and duration of strikes was a mandatory strike vote, a requirement not currently contained in our labor laws.

The "judge-made law" contention. Supporters of H.R. 5 contend that Mackay is solely a product of a Supreme Court ruling which was never intended by Congress. Yet, as has been repeatedly shown, when Congress believes the Court oversteps its bounds, it usually doesn't take fifty years to react.

Indeed, an examination of the legislative history of the Wagner Act as well as later amendments to the statute makes it clear that the Mackay doctrine was not only contemplated by the NLRA's authors,[5] but was embraced by the Congress thereafter.

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[4]M. Gunderson and A. Melino, "The Effects of Canadian Labour Relations Legislation on Strike Duration," 8 Journal of Lab. Econ. 295 (1990).

[5]When asked on the House floor whether there was anything in the bill that would prevent employers from bringing in "strikebreakers", the House floor manager, Rep. Connery of Massachusetts, stated: "I do not think there is. The employers' rights under the law will be just as strong and secure after the passage of this act as they were before." 79 Cong. Rec. 9684 (1935), reprinted in National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935 at 3115-16 (1949).

Hence, one year after Mackay was decided, Senator Robert Wagner (D-NY), for whom the Act was named, was able to make the following observation:

> Every step that the Supreme Court has taken toward clarifying the meaning and defining the scope of the act has made it easier for workers and employers to deal successfully under its provisions.[6]

In addition, in the year following Mackay, another of the Act's liberal architects--Sen. Robert La Follette--introduced a bill to prohibit the use of certain temporary strike replacements. In reporting the bill, the Senate Labor Committee stated that the term "strikebreaker" was to be "very narrowly defined":

> The typical strikebreaker . . . is a professional mercenary hired at a bonus to replace regular workers who have left their employment because of a strike or lockout. . . . These men are usually employed for the duration of a strike and are frequently vicious in character. Their employment inevitably leads to bitter strife. The bill does not deprive an employer of the right to secure legitimate replacements so that he can renew operations with a force of bona fide employees."[7]

This was described elsewhere in the report as allowing the employer to "secure bona fide workmen to operate his plants on a permanent basis."[8]

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[6]National Labor Relations Act and Proposed Amendments: Hearings Before the Senate Comm. on Education and Labor, 76th Cong., 1st Sess. 4 (1939) (Statement of Sen. Robert F. Wagner).

[7]Reported and partially reprinted in "Senate Committee Report on Oppressive Labor Practices Bill", 4 LRRM 1065, 1067 (emphasis added).

[8]Id. at 1066 (emphasis added).

If Mackay was acceptable to the Wagner Act's architects, why didn't they actually write it into the Act itself? Probably because they felt it was too obvious to be stated. We discuss Mackay in terms of being a fifty-year old principle. Actually, the legal ability of employers to replace strikers goes back thousands of years to the inception of employment relationships. In fact, had Congress not intended Mackay, a specific provision would have been necessary.

Ultimately, rather than rejecting Mackay, the Congress actually codified it in 1959 by including within Section 9(c)(3) of the NLRA a provision granting replaced economic strikers with voting rights for one year after the strike. This 1959 provision was sparked by the replacement of 340 strikers by the O'Sullivan Rubber Corporation--an action that, according to the proponents of H.R. 5, never occurred prior to the 1980's. Yet, Congress did not object to the hiring of replacements in this instance. What was objectionable was that the union was decertified in an election in which the replaced strikers were ineligible to vote. In guaranteeing those strikers a right to vote, the bill "closed the door to union-busting practices" to paraphrase a statement by Senator John Kennedy on the Senate floor.[9]

The "destruction of the right to strike" contention. It is claimed that, with Mackay, the right to strike is eviscerated and the balance of power is shifted entirely to the employer. While fifty years of robust strike activity would seem of itself to

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[9]86 Cong.Rec. 16414 (1959).

refute this, the argument goes to the very heart of what our labor laws are about. The "right to strike"--like the right of free speech and others which are constitutionally guaranteed--is not absolute. It does enjoy substantial protections. For example, it is no longer a crime, as was true in the early 19th century. A legal strike may no longer be enjoined, as was true in the early part of this century. Workers who participate in a legal strike may no longer be retaliated against by the employer, as was true before the Wagner Act when many employers engaged in "divide and conquer" strategies by singling out the union's most active supporters for reprisals.

But, at some point, the right to strike must yield to the rights of others. As was observed in 1957 by Justice William Brennan: "[T]his protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide."[10] Thus, when a union invokes the offensive weapon of the strike, the law allows the employer to invoke the defensive shield of operating with other employees. It should be noted that, in using this shield, the employer is not just protecting profit margins and market shares, but the jobs of other employees who are outside the striking unit.

Yet, the law imposes substantial restraints on the employer's ability to use replacements. Most significantly, the law only permits those other employees to be paid what the

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[10]NLRB v. Truck Drivers Local Union, 353 U.S. 87, 77 S.Ct. 643, 647 (1957).

employer was offering the strikers.[11] Thus, if the strikers are saying "we aren't going to work for you because you aren't offering us what we are worth," they run the risk that the employer might find others who will. In turn, if the employer were to be denied that opportunity, there are few constraints on the economic demands over which the union would call a strike.

The risks to both parties under current law are entirely consistent with the original scheme envisioned by the framers of the Wagner Act. They strongly believed that employees who had to negotiate wages and working conditions with their employer on an individual basis would never receive what they were worth. Thus, if the law were to protect their solidarity, they could gain enough negotiating strength collectively to be able to receive a fair return for their labors.

Is it unfair that striking workers should run the risk that the employer will find others who will accept his offer? The Warren Court didn't think so when it said, in 1965: "[The] right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage."[12]

Even if replacements are hired, the employer cannot fire the strikers. As openings occur after the strike ends, he must

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[11] NLRB v. Crompton-Highland Mills, 337 U.S. 217 (1949).

[12] American Ship Building v. NLRB, 380 U.S. 300, 85 S.Ct. 955, 962-3 (1965).

reinstate the strikers.[13] He must also continue to bargain with the union[14] which may (and it often does) result in an agreement reinstating the strikers, as is illustrated by the New York Daily News situation.

If Mackay seems harsh, so is the strike weapon, prompting Professor Archibald Cox to characterize our collective bargaining system as "a brute contest of economic power somewhat masked by polite manners and voluminous statistics."[15] Yet, the risks posed to both sides by this economic conflict are what keeps the parties honest at the bargaining table. If the risks are removed for one party--as would occur if Mackay were reversed--it would be like tying a catcher's throwing arm behind his back. The baserunners would steal at will!

Ultimately, the study concludes that none of the contentions offered to support overturning Mackay has a solid basis in fact or theory to justify the risks of economic upheaval likely to result from such a policy reversal.

The Results of the Penn & Schoen Poll on Striker Replacement and Other Labor Law Issues

Between January 19-28, 1991, Penn + Schoen Associates, Inc. conducted a national telephone poll of 1,002 persons on several

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[13]Laidlaw Corp. v. NLRB, 171 NLRB 1366, 68 LRRM 1252 (1968), enf'd, 414 F.2d 99, 71 LRRM 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920, 73 LRRM 2537 (1970).

[14]NLRB v. Curtin Matheson Scientific, Inc., 110 S.Ct. 1542 (1990).

[15]Cox, "The Duty to Bargain in Good Faith," 71 Harv.L.Rev. 1401, 1409 (1958).

labor issues related to the striker replacement legislation. Twenty percent (20%) of the respondents were union members, slightly higher than their representation in the American public. The margin of error of the poll results was plus or minus 3.1%.

The poll was prompted by an earlier Penn & Schoen poll paid for by the AFL-CIO in January 1990, which has been touted as showing broad public support for H.R. 5 by the proponents of this legislation. However, its results are compromised because it asked a misleading and factually inaccurate question concerning the legal status of economic strikers who are replaced during a strike by Mackay replacements.

The AFL-CIO question leads the respondent to believe that economic strikers are fired when they exercise their right to strike under the NLRA and Railway Labor Act, when in fact they continue to be employees of the firm and have "first in line" reinstatement rights when the strike is over. Under the NLRA and RLA, it is an unfair labor practice to discharge economic strikers.

AFL-CIO Poll

> Once a Majority of Employees Vote to Strike, Should Companies Be Allowed to Fire Employees for Striking and Hire Permanent Replacements or Should Companies Not Be Allowed to Hire Permanent Replacements?
>
> - o should be allowed 26%
> - o should not be allowed 65%
> - o don't know 10%

As a result of this question, the Foundation and COLLE decided to ask in a factually accurate and straight forward way a

series of question related to the striker replacement legislation, the highlights of which we present in this testimony.

1. Union Power

The Penn + Schoen poll shows that 73% of all Americans say that unions have too much or just enough power. These are the same results as found by a March 1990 Time-CNN poll that asked the same question.

Do You Think Labor Unions In This Country Are Too Powerful, Have Just The Right Amount Of Power, Or Are Not Powerful Enough?

o	too powerful	39%
o	right amount	34%
o	not enough power	22%
o	don't know	6%

2. Need for Additional Union Protections

By a better than 2 to 1 margin (64% to 28%), Americans do not want Congress to do more to protect labor unions.

Some People Say We Need The Congress To Do More To Protect Labor Unions. Other People Say That Unions Have Sufficient Safeguards And Congress Does Not Need To Pass More Legislation. Which Comes Closer To Your View?

o	Congress more	28%
o	enough now	64%
o	don't know	7%

3. Right to Operate

The Penn + Schoen poll shows that most people think that companies should have a right to operate if unions have the right to strike. Sixty-three percent (63%) support the use of

replacement workers during a strike compared to 25% who oppose the use of replacement workers.

If Unions Have The Right To Strike, Should Companies Be Permitted To Operate During A Strike Using Replacement Workers?

o	yes	63%
o	no	25%
o	depends (vol)	8%
o	don't know (vol)	3%

4. Firing Replacement Employees

Penn & Schoen then asked a question that goes to the heart of the striker replacement legislation. The results show that the public opposes the firing of replacement workers at the end of a strike by 54% to 34%.

Once A Strike Has Ended In Which Replacement Employees Have Been Hired, Should The Replacements Be Fired?

o	no	54%
o	yes	34%
o	don't know	12%

5. Public Health and Safety Injunctions

The law currently does not permit injunctions to stop a strike if public safety is at stake. The Penn & Schoen poll shows that 84% of the American public thinks that judges should be able to enjoin strikes if public safety is in jeopardy.

Some Organizations, Like Hospitals, Must Continue To Provide Services Even If Employees Go On Strike. If Public Safety Is At Stake, Should A Judge Have The Power To Stop The Strike?

o	yes	84%
o	no	13%
o	don't know	3%

Significantly, union member respondents agree.

	Yes	No	dk
not a union member	85%	12%	3%
public sector union member	86%	13%	1%
private sector union member	76%	19%	5%

6. Secret Ballot Strike Vote

There is broad public support, including union members, for requiring a secret ballot vote before a union can call a strike. A 84% to 11% majority favor a law that requires a secret ballot before a strike.

> There Is No Law That Says A Majority Of Employees Must Vote Yes To Strike Before The Union Can Call A Strike. Would You Favor Or Oppose A Law That Gives The Employees The Right To A Secret Ballot Before A Strike Can Take Place?
>
> - o favor 84%
> - o oppose 11%
> - o don't know 5%

	Yes	No	dk
not a union member	84%	11%	4%
public sector union member	80%	12%	7%
private sector union member	85%	12%	3%

The broad public support for a secret ballot vote before a strike is important because of the results of a study by two Canadian researchers, Professors Morley Gunderson and Angelo Melino of the University of Toronto, who found in a study entitled "The Effects of Public Policy on Strike Duration" published by the Journal of Labor Economics, Vol. 8, No. 3 (1990), that this labor policy has the strongest negative relationship to the incidence and duration of strikes.

7. Right to Vote for Union Representation

Strong majorities of Americans, including union members, favor a secret ballot election to determine whether a union can represent employees. Seventy-nine percent (79%) favor requiring a secret ballot vote as opposed to 15% who disagree.

Right Now A Union Can Represent Employees Without A Majority Of Them Choosing The Union In A Secret Ballot Election. Should A Secret Ballot Election Be Required To Determine Whether A Union Can Represent The Employees?

o yes	79%
o no	15%
o don't know	6%

	Yes	No	dk
not a union member	79%	15%	6%
public sector union member	85%	11%	4%
private sector union member	73%	19%	8%

8. Union Representation

For the past several years, organized labor's representation of the workforce has been declining. Currently, only about 12% of private sector employees are represented by a union. A number of reasons have been advanced for this trend, but the Penn + Schoen poll indicates that most Americans do not favor a union at work. In the Penn + Schoen national sample, 59% opposed a union, while 27% favor a union in the workplace. As mentioned, 20% of the persons polled were union members.

It is often stated that the reason employees oppose unions in the workplace is because they are afraid of the employers' reaction. Only 1% of those opposed to unions stated that they were afraid of the employers' reaction. Fifty-four percent (54%)

said that unions were not relevant to their job, that unions would not help them in their situation or that there were better ways to protect their interests than unions.

Why Don't You Want A Union Where You Work? Afraid Of Employer's Reaction? Don't Like Union? Anti-Union, Don't Think Union Would Help Or Protect Interests Not Relevant To My Job/Profession? There Are Other/Better Ways To Protect Interests Than Unions?

o	afraid	1%
o	anti-union	10%
o	not help	19%
o	not relevant	27%
o	better ways	8%
o	other	25%
o	don't know	11%

Conclusion

The Foundation's policy research on legislation to overturn the 1938 Mackay decisions finds that the contentions of the proponents of the legislation are not supported by the facts. Thus, Mackay replacements have been used consistently and at about the same low level for 53 years, and there is no evidence of any increase in their use in the 1980's. The use of Mackay replacements was contemplated by the authors of the NLRA and was necessary to the Mackay decision of the Supreme Court. A balance of legal rights, e.g., protection against anti-union acts, not a balance of economic power, is what is contemplated by our Nation's labor laws. When a union uses its "right to strike", the law allows the employer the "right to operate" using Mackay replacements. The policy has been in place for over a half a century and only now is being questioned. Indeed, Congress has incorporated the doctrine by reference in amendments to the NLRA

in 1959 and the courts have followed it in cases under the Railway Labor Act. Finally, not only do the U.S.'s economic competitors reject Mackay, they reject our entire labor law system.

Further, there is no public support for this legislation. Fully, 73% percent of the public say unions have enough or too much power, and by a 2 to 1 margin (64% to 28%), Americans say that they do not want Congress to do more to protect labor unions. By 63% to 23%, the public supports the right of companies to operate during a strike with replacement workers. Moreover, the public opposes firing replacements at the end of the strike, 54% to 34%.

Thank you for your consideration of the Foundation's policy findings and conclusions. We will be glad to answer any questions that you may have.

Figure 1

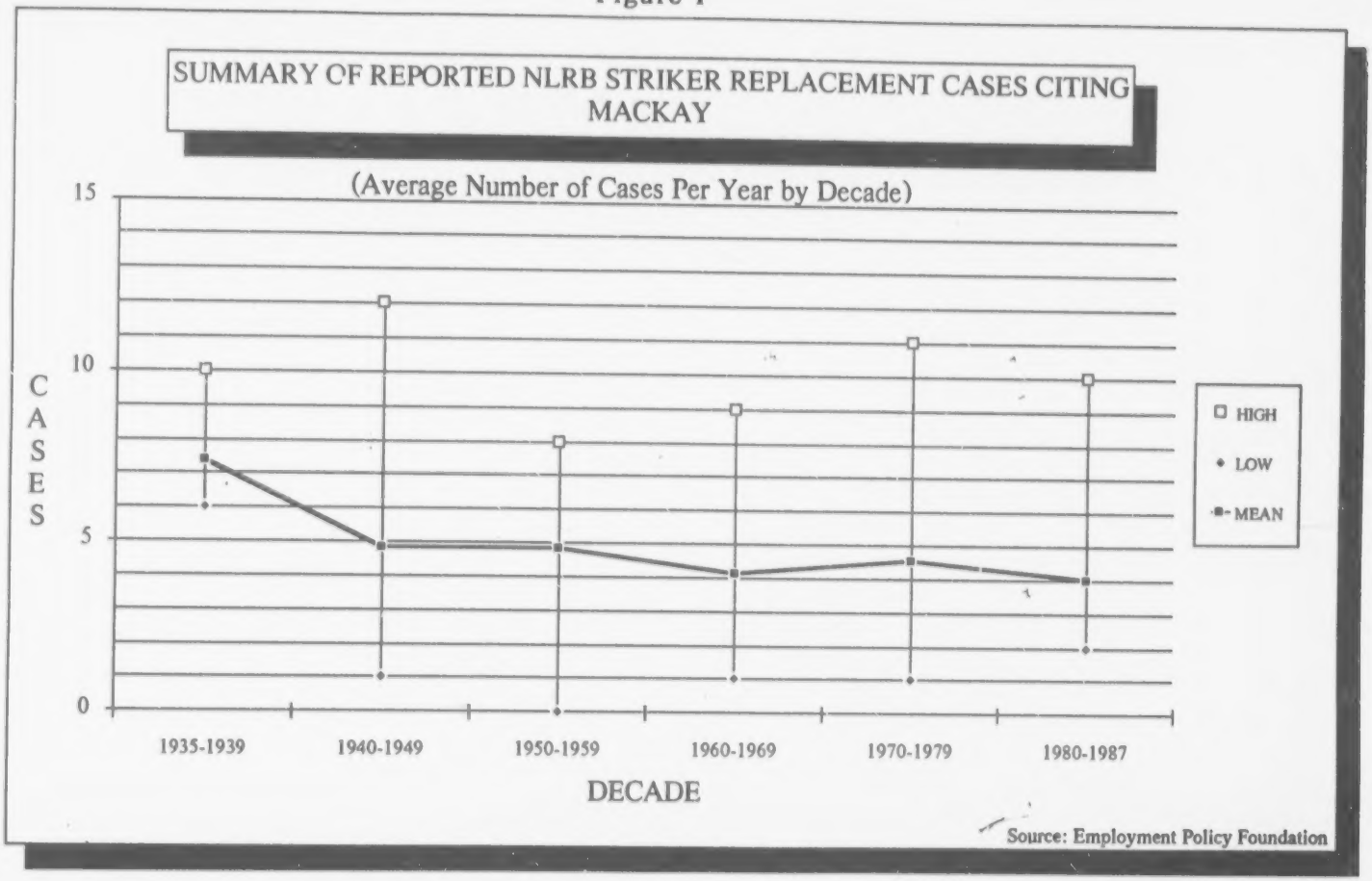
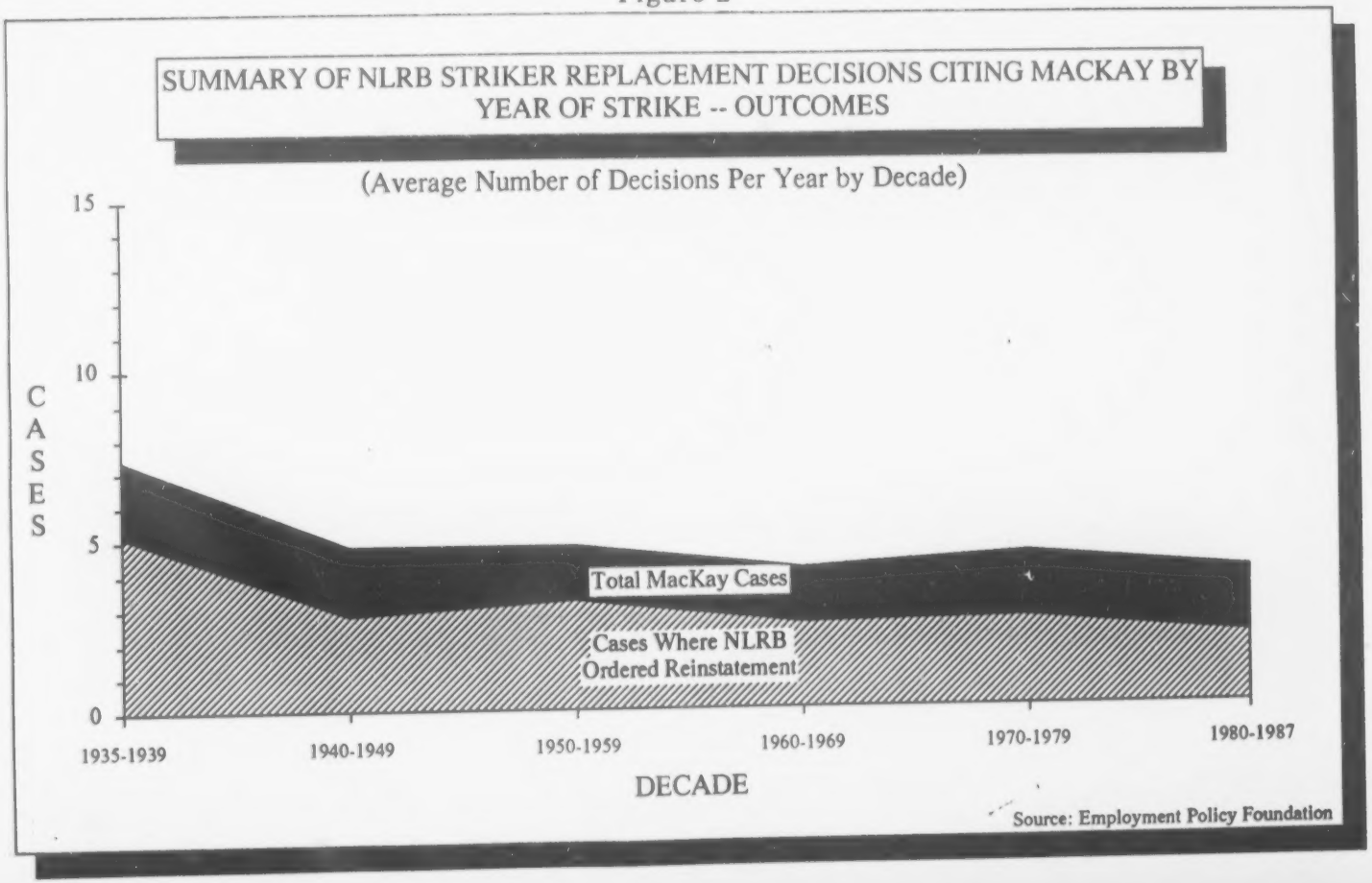

SUMMARY OF REPORTED NLRB STRIKER REPLACEMENT CASES CITING MACKAY
(Average Number of Cases Per Year by Decade)
15
10
5
0
CASES
HIGH
LOW
MEAN
1935-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1987
DECADE
Source: Employment Policy Foundation

Figure 2


SUMMARY OF NLRB STRIKER REPLACEMENT DECISIONS CITING MACKAY BY YEAR OF STRIKE -- OUTCOMES
(Average Number of Decisions Per Year by Decade)
15
10
5
0
CASES
Total MacKay Cases
Cases Where NLRB Ordered Reinstatement
1935-1939
1940-1949
1950-1959
1960-1969
1970-1979
1980-1987
DECADE
Source: Employment Policy Foundation

Statement of

David Westfall

John L. Gray Professor of Law

Harvard Law School

Submitted to the

House Committee on Public Works and Transportation

Re: H.R. 5

on

Permanent Striker Replacements

Cambridge, Mass.

April 10, 1991

Introduction

As a professor of labor law, I feel an obligation to point out why H.R. 5 reflects unsound policies and would be unfair to nonstriking employees and to the consuming public, as well as to employers. The following statement is derived from my article, "Striker Replacements and Employee Freedom of Choice," 7 Labor Lawyer 137 (Winter 1991).

Summary

Far from being the modest revision that its backers portray, H.R. 5 would fundamentally change our labor laws. For over forty years, since the enactment of the Taft-Hartley Act in 1947, it has been a basic principle that employees can choose freely whether or not to strike or to engage in other concerted activities. Both employers and unions have been prohibited from discriminating against an employee because of the choice he or she makes. The bill would abolish that protection of employees' freedom of choice to strike or not to strike. In its place would be a mandated preference for strikers.

Excessive and unreasonable union bargaining demands for wage increases and wasteful and uneconomic work rules would no longer be limited by the possibility that a strike

could lead to permanent replacement of the strikers, with the following likely results:

1. Employees would be free to strike repeatedly, no matter how excessive their demands were in relation to prevailing market wage rates, knowing that their jobs would always be waiting for them unless and until their employer eliminated the jobs or went out of business;
2. The mandated preference for strikers, without regard to the cause of the strike, would reduce employers' incentive to bargain in good faith. Today employers subject to the NLRA know that a failure to fulfill this bargaining obligation may make a strike an unfair labor practice strike. In that case, the strikers would enjoy an unqualified right to reinstatement, even if they have been replaced. If strikers' right to reinstatement were the same without regard to unfair labor practices, employers would have less incentive to bargain in good faith. The number and duration of strikes, and resulting hardships for workers as well as the consuming public, would be likely to increase.
3. A strike-bound airline or railroad or other struck firm would often be unable to operate efficiently with temporaries and non-striking employees as replacements, and might even be shut down altogether.

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The result could impose heavy burdens on shippers and travelers, as well as on consumers of goods and services produced or transported by the struck firms.

None of the arguments advanced by proponents of this unnecessary and unwise legislation will withstand close analysis.

Analysis of H.R. 5

The bill would amend Paragraph Fourth of section 2 of the Railway Labor Act (RLA) to provide:

> (b) No carrier, or officer or agent of a carrier, shall--
>
> (1) offer, or grant, the status of a permanent replacement employee to an individual for performing work in a craft or class for the carrier during a dispute involving the craft or class; or
>
> (2) otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, over an individual who--
>
> (A) was an employee of the carrier at the commencement of the dispute;
>
> (B) has exercised the right to join, to organize, or assist in organizing, or to bargain collectively through the labor organization involved in the dispute; and
>
> (C) is working for, or has unconditionally offered to return to work for, the carrier.

Provision (b)(1) would abrogate the long-standing doctrine, derived from language used by the Supreme Court in

its 1938 decision in the Mackay Radio[1] case, under which employers subject to the National Labor Relations Act (NLRA) may permanently replace employees who strike over economic (but not unfair labor practice) issues in order to continue business operations during a strike. The Mackay doctrine's application during the "self-help" stage of disputes between employers and unions subject to the RLA is generally accepted.[2]

Provision (b)(2) would supercede the Supreme Court's recent decision in Trans World Airlines v. Independent Federation of Flight Attendants (TWA v. IFFA),[3] under which an employer subject to the RLA (and presumably the same result would follow under the NLRA) is not required to discharge "cross-overs" (strikers who return to work before the strike ends) in order to make room for unreinstated strikers with greater seniority.

Parallel provisions would make comparable amendments in the NLRA.

The result would be a major change in the present balance of power between employers and unions--a balance that has served us well by protecting the right of employees to organize and bargain collectively without making them the exclusive owners of their jobs, no matter how high the wages or how restrictive or inefficient the work rules they may seek to impose in collective bargaining. At the same time, the Mackay doctrine has protected the right of employees to

choose to work, rather than going out on strike. Under H.R. 5, employers would be forced to discriminate in favor of strikers and against non-striking employees by denying the latter group any opportunities for permanent status and promotion that would otherwise go with their jobs.

Proponents of such a radical realignment in the way present law balances the interests of strikers, employers, and non-striking employees bear a heavy burden to justify the proposed change--a burden which they have yet to discharge. None of the major arguments commonly advanced for this purpose will withstand close analysis.

Arguments of Proponents of H.R. 5

Proponents commonly assert that:

(1) employees should not risk loss of their jobs for exercising the right to strike;

(2) employers rarely need to hire permanent replacements in order to operate during a strike;

(3) replacement employees receive at best only an illusory permanency of employment;

(4) permanent replacement of strikers generates violence while the strike continues and hostility and ill will when it ends;

(5) employers use the risk to employees from permanent replacement of strikers as an argument against unions in representation elections and the reality

of such replacement to rid themselves of unions and union sympathizers;

(6) Mackay Radio was a product of its times, when the doctrine of employment at will gave employers the unqualified right to fire employees for any reason or no reason, and is incompatible with current statutory and judicial protection against wrongful discharge;

(7) Canadian and other foreign experience with a ban on hiring permanent replacements demonstrates that employers can find temporaries to do the work;

(8) striking employees' bargaining demands are moderated by the risk of loss of their paychecks.

An additional argument made against the Supreme Court's holding in TWA v. IFFA, which denied unreinstated strikers with greater seniority the right to displace non-striking employees and strikers who had previously returned to work, is that it permits employers to "bribe employees to break ranks with their fellows and the union . . . reducing its militancy and effectiveness."[4] However, the fundamental question here, as with the Mackay doctrine itself, is whether to continue meaningful protection of the right of employees to choose to work rather than to go out on strike.

As the following analysis demonstrates, none of the above arguments carry conviction.

(1) Risk of job loss by strikers for exercising a protected right

Protection of the right to strike has never meant that exercise of that right shall be free from all unfavorable consequences. If the law were otherwise, employers would be required to pay wages to employees on strike in order to avoid burdening their right to strike.

What protection of the right to strike clearly does require is that returning strikers shall not be discriminated against in relation to non-striking applicants for available positions. Indeed, for thirty years after Mackay Radio, the NLRB held with judicial approval, that employers were not required to give replaced economic strikers who applied for reinstatement any preference over other applicants.[5] Permanently replaced economic strikers merely had the right not to be penalized for their concerted activity, and were not entitled to preferential status in hiring.

However, in 1967 the Supreme Court held in Fleetwood Trailer v. NLRB[6] that the hiring of new employees when there are outstanding applications for reinstatement from strikers is presumptively a violation of the Act, unless the employer demonstrates a "legitimate and substantial" business reason for the failure to hire the strikers. The following year, relying on Fleetwood, the Board in Laidlaw Corp.[7] held that employers were required to give preferential treatment to strikers' applications for reinstatement. For over two

decades strikers' "Laidlaw rights" to this mandated employment preference has been recognized in order to protect the right to strike, overcoming the explicit protection in NLRA § 7 of the right of employees to refrain from concerted activities.

Admittedly, from a striker's viewpoint, being permanently replaced may seem similar to being fired for striking, as his preferential right to reinstatement over other job applicants does not guarantee him a job. However, if strikers were not subject to the possibility of permanent replacement, it is unclear what if anything would limit their bargaining demands. They would be free to strike repeatedly until such demands were met, knowing their jobs would always be waiting for them unless the employer abolished the positions or went out of business. As TWA v. IFFA illustrates, even the possibility of permanent replacement under present law does not inhibit unions from demanding wages that over three and one-half times the rate required to fill all vacancies.[8] Without that possibility, one can only speculate as to how high union bargaining demands would reach.

(2) Employers' need for permanent replacements

Although some struck employers operate with supervisors and non-striking employees and others manage with temporary replacements, it is difficult to imagine others doing so successfully. Skilled employees are unlikely to be willing,

unless the demand for their services is unusually slack, to fill a striker's job without some assurance that they are not subject to discharge whenever the striker offers to return. For example, if the teaching staff of an educational institution walked off their jobs, it seems highly unlikely that the school would be able to attract temporaries of equal caliber to fill their places.

(3) Illusory "permanency" for replacements

The permanency afforded replacements under present law may be far short of absolute, and does not eliminate the possibility of discharge. Nevertheless, the possibility of continued employment may make a job far more attractive to a prospective striker replacement than the same job would be if he knew he was subject to discharge at any time.

(4) Violence and hostility from the presence of permanent replacements

It is undeniable that strikers sometimes do react violently to the hiring of permanent replacements and that the hostility such hiring engenders may persist after the strike ends. However, even the hiring of temporary replacements sometimes produces a violent response. And it is not easy to justify abrogating the freedom of choice of non-striking employees and limiting the protection of employer and consumer interests merely because of illegal, violent conduct of striking employees, rather than taking more direct steps to deter such conduct.

(5) Permanent replacement of strikers as an argument against unions in representation campaigns and as a means of deunionizing

Fear of permanent replacement as a result of a strike doubtless influences some employees to vote against union representation. But a ban on such replacement would at most reduce, not eliminate, such fears. Fear of plant closure or curtailed production as a response to union demands or union contracts could continue to influence election outcomes.

The employer who provokes a strike in order to avoid bargaining with a union and to permanently replace union adherents risks being guilty of a refusal to bargain in good faith, so that the strike is an unfair labor practice strike with an unqualified right to reinstatement for the strikers. And the employer who seeks to use the presence of striker replacements and nonstriking employees as a basis for good faith doubt of a union's majority status must take account of the refusal of the NLRB, recently upheld by the Supreme Court in Curtin Matheson Scientific,[9] to presume that such employees do not support the union.

(6) Mackay Radio as a product of its times and the then prevalent doctrine of employment at will

Some proponents of H.R. 5 assert that Mackay Radio is an outmoded product of an earlier era, when the doctrine of employment at will held away, and that it is incompatible with increasing statutory and judicial protection against

wrongful discharge. However, there is a qualitative difference between protection against wrongful discharge afforded whistle-blowers on public policy grounds, for example, and protection of employees who leave their jobs voluntarily from loss of employment.

(7) Canadian and other foreign experience with a ban on permanent replacement of strikers

Proponents of H.R. 5 sometimes refer to the experience in foreign countries, particularly in Canadian provinces, whose labor laws are sometimes described as being most nearly comparable to ours, as demonstrating an absence of adverse effects from such a ban. For example, in Ontario, strikers enjoy an absolute right of reinstatement during the first six months of a strike.[10] Quebec goes farther than even most proponents of the pending bills now propose and bars employers from using any replacements, either temporary or permanent, or outside contractors to perform struck work.[11]

Whether or not the Canadian experience supports enactment of similar legislation here is another matter. Some commentators report that the Quebec legislation

> is associated with statistically significant and quantitatively large increases in both strike incidence and duration and hence overall strike activity.[12]

A leading text refers to Canada's "rather unenviable record of strikes, as compared with other western industrialized countries."[13]

It also is worth noting that the Canadian unemployment rate for February, 1991, of 10.2% was over half again as large as that in the United States for the same month. Although there is no demonstrable connection between Canada's rate of unemployment and Canada's labor laws, the former provides no support for our copying the latter.

Indeed, if we were to undertake to copy Canadian labor law, the changes in our system would be profound. A basic difference is that neither federal nor provincial legislation explicitly protects the fundamental freedom of choice of employees to refrain from engaging in strikes and other concerted activities that has been a cornerstone of American labor law for over forty years.[14]

(8) Employees' loss of paychecks as a moderating influence on bargaining demands

It is often asserted that employees' loss of paychecks is a moderating influence on union bargaining demands, so that the risk of permanent replacement is not needed for this purpose. However, in tight labor markets, strikers, particularly those whose skills are in demand, may obtain other jobs during a strike, so that another paycheck replaces that which is lost. Employees who do not obtain other jobs often qualify for unemployment compensation[15] or may receive union strike benefits. Strike-bound enterprises, on the other hand, are sometimes forced into bankruptcy.

Conclusion

The right of employees to choose to work, rather than to go out on strike, and the right of employers to offer permanency to employees who make that choice, are important aspects of the balance of interests reflected in American labor law today. H.R. 5 would upset that balance, with far-reaching consequences for non-striking employees, employers, and the consuming public. Such legislation is both unnecessary and unwise.

Footnotes

1. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

2. See Trans World Airlines v. Independent Federation of Flight Attendants, 109 S.Ct. 1225, 1230 (1989), in which the union acknowledged that strikers could not displace permanent replacements under either the RLA or the NLRA.

3. See note 2 supra.

4. See Hearings on S. 2112 before the Subcommittee on Labor and Human Resources (101st Cong., 2d sess. (June 6, 1990) (statement of Professor Julius Getman).

5. See, e.g., Bartlett-Collins Co., 110 NLRB 395, aff'd sub nom. Flint Glass Workers v. NLRB, 230 F.2d 212 (D.C. Cir. 1956), cert. denied,. 351 U.S. 988 (1956). For a discussion, see 1 Developing Labor Law 227-228 (C. Morris, ed.) (2d ed. 1983).

6. 389 U.S. 357 (1967).

7. 171 NLRB 1366 (1968), enforced, 414 F.2d 99 (7th Cir. 1969), cert. denied,. 397 U.S. 920 (1970).

8. See Independent Federation of Flight Attendants v. TWA, 682 F. Supp. 1003, 1012 n. 6 (W. D. Mo. 1988), aff'd, 878 F.2d 254 (8th Cir. 1989).

9. 110 S.Ct. 1542 (1990).

10. See 1980 Ont. Rev. Stat. ch. 228 sec. 73.

11. See 1977 Que. Rev. Stat. ch. C-27, secs. 109.1 - 109.4.

12. Morley Gunderson, Ángelo Melino & Frank Reid, *The Effects of Canadian Labour Relations Legislation on Strike Incidence and Duration*, 41 Labor L. J. 512, 517 (1990).

13. H.W. Arthurs, et al, *Labour Law & Industrial Relations In Canada* ¶ 575 (3d ed. Kluwer 1988).

14. Another major difference is the extent to which labor relations are governed by provincial, rather than national, laws. Thus the jurisdiction of the Canada Labour Relations Board is limited to approximately one-tenth of the work force, the balance being under provincial authority. See ABA Committee on Intl. Labor Law, The Labor Relations Law of Canada 18 (1977). Adoption here of some provincial labor laws would produce dramatic changes

in the NLRA. For example, Quebec goes so far as to require union membership for employees in the construction industry. See 1977 Que. Rev. Stat. ch. 4-20 sec. 39, added by L. 1978 ch. 58 sec. 8.

15. State statutes generally contain provisions barring payment of unemployment compensation to workers whose unemployment is due to a labor dispute, but there are wide variations in the ways in which the bar is applied. In New York, it automatically ends after seven weeks. See N.Y. Lab. Law sec. 592(1). The New York statute was held not to be preempted by the NLRA in New York Tel. Co. v. New York State Dept. of Labor, 440 U.S. 519 (1979), over the employer's objection that it was in effect being forced to finance the strike against it. In many states, disqualification turns on whether the dispute causes a "stoppage of work," which may be construed to refer either to the individual employee's work or to the employer's operations as a whole. See generally, Comment, Unemployment Benefits, Laid-Off Workers and Labor Disputes, 19 Willamette L. Rev. 737 (1983).

ADDITIONS TO THE RECORD

Alliance to Keep Americans WORKING

1615 H Street, N.W., Washington, D.C. 20062 Telephone: (202) 463-5944 Fax: (202) 887-3445

Contact: William I. Greener III
(703) 683 - 8936

Washington, DC, APRIL 10, 1991. Jeffrey H. Joseph, chairman of the Alliance to Keep Americans Working (AKA Working), today urged the Aviation Subcommittee of the U.S. House of Representatives' Public Works and Transportation Committee to reject H.R. 5, also known as the the "Strike Bill." This legislation effectively would preclude the use of replacement workers in a labor dispute over economic issues such as pay and fringe benefits, even when an employer has bargained in good faith.

"The temptation to tinker with laws that have well served the nation for more than a half century should be resisted," said Joseph, who is also vice president for domestic policy at the U.S. Chamber of Commerce. "This is more than following the old adage, 'If it ain't broke, don't fix it.' This is a case of, 'If it ain't broke, don't break it.' "

AKA Working is a broad based coalition of more than 85 employers, trade associations, and other organizations committed to supporting government policy designed to increase jobs and the competitive position of American business. H.R. 5 would amend both the National Labor Relations Act and the Railway Labor Act.

Jeffrey C. McGuiness, president of the Labor Policy Association and another leader in the Alliance explained, "Employees should have the right to strike, and employers should have the right to operate during that strike to protect the jobs of those not involved in the strike. And there are times when replacements can only be obtained if a permanent position is promised. Meanwhile, the law already bars hiring permanent replacements if a company commits unfair labor practices and subjects it to considerable liability when it does so. This has been federal labor policy since the Supreme Court's Mackay decision in 1938. Why would Congress wait 50 years to change this policy unless it made good sense?"

Joseph concludes: "Bumper sticker arguments will not contribute to sound public policy or to a good relationship between employee and employer. The American economy and the future of American workers only will be jeopardized by promoting strikes and inflationary demands, which will hurt U.S. competitiveness. The proposed legislation is bad for workers, business, and the American economy."

- 30 -

Alliance to Keep Americans WORKING

1615 H Street, N.W., Washington, D.C. 20062 Telephone: (202) 463-5944 Fax: (202) 887-3445

Fact Sheet

Myth: *Under current law, if workers go on strike against an employer who is treating them unfairly, for all intents and purpose, they are fired.*

FACT: If a strike is based on unfair labor practices by the employer, jobs are protected by existing law. Employers may only continue to operate by hiring permanent replacements when a worker walks away from a job simply because an employer will not immediately meet demands for a particular wage level and/or set of benefits. In point of fact, during the 1980s, only four per cent of striking workers were replaced.

Myth: *Under current law, the scales are tilted against the worker, and an employer has no incentive to negotiate a fair contract.*

FACT: The threat of strike presents employers with numerous incentives to bargain a fair contract. Obviously, strikes disrupt business and no responsible employer seeks them. Furthermore, strikes confront employers with these choices: to shut down and lose all revenues, to incur the considerable costs associated with the recruitment and training of replacement workers, or to meet the demands of strikers. Finally, failure to bargain in good faith means the employer is engaging in an unfair labor practice and legally *cannot* replace strikers. Clearly the scales are at the very least currently balanced, with many clear economic incentives for the employer to negotiate a fair contract.

Myth: *Permanently replacing workers who go on strike is only recently a widespread activity by management.*

FACT: The right of employers to replace those workers choosing to strike has been recognized since 1938. In fact, an independent study conducted by the Employment Policy Foundation found that NLRB cases involving the hiring of replacement workers have remained relatively constant since 1938. Moreover, the courts have repeatedly affirmed this right as part of "the free play of economic forces" between labor and manager.

Myth: *Strikes now are one-sided in their outcome.*

FACT: One needs to look no further than the headlines to realize that this is untrue. The Pittston Coal and New York Daily News strikes both resulted in substantial concession to union demands. In the Eastern Airlines strike, management's failure to achieve a settlement with strikers led to the executives' downfall. Strikes always cost businesses substantially both in profits and productivity. Besides, the right to *strike* does not, and should not, guarantee the right to *win*.

Myth: *Strikes happen only when members of an organized unit vote to reject a contract offer.*

FACT: Union leaders do not need formal authorization to strike and can essentially do so at any time, based on any criteria and without a secret ballot of members.

Myth: *After a strike ends, a worker who has been replaced has lost his or her job forever.*

FACT: Federal law *requires* that an employer recall striking workers by seniority and qualification as jobs become open after a strike. This right exists absolutely unless an employee takes another job. In fact, many strikes are settled with an agreement to <u>immediately</u> reinstate strikers.

Myth: *The proposed change in law serves to remedy an imbalance in current law.*

FACT: The labor market is very finely balanced with many checks on both labor and employers. While unions must weigh the economic costs to their rank-and-file of a strike, the strike is a potent offensive weapon in the arsenal of a union. If the employer cannot find workers willing to accept its wages, then the employer cannot conduct business and will likely meet the demands of striking employees.

Conversely, if an employer can find sufficient workers in the wider labor market who will accept its wages, then the union's demands are probably excessive and the strike will likely prove unsuccessful. Enacting this bill would tip the balance decidedly against employers, remove an important restraint on labor's use of the <u>offensive</u> strike weapon, and remove any <u>defense</u> an employer has against a strike. It is also important to note that an employer may not offer replacement workers wages or benefits beyond those of the final contract offer of the union-represented workers.

Alliance to Keep Americans WORKING

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Q & A

Question: *WHAT IS H.R. 5/S. 55?*

Answer: H.R. 5/S. 55 is legislation introduced by Rep. William Clay (D-MO) in the House and Howard Metzenbaum (D-OH) in the Senate which would make it illegal for businesses to hire persons to replace workers who have walked off the job when an employer is unwilling to meet workers' demands for a specific wage and/or benefit package. Current law permits businesses to hire replacement workers in order to continue their operations during an economic strike.

Question: *DOES CURRENT LAW ALLOW EMPLOYERS TO FIRE STRIKERS?*

Answer: No. If a strike is based on unfair labor practices by the employer, jobs are protected by existing law, meaning they can not be replaced. Moreover, an employer who engages in unfair labor practices, such as the failure to bargain in good faith, is subject to costly penalties. Employers may only continue to operate by hiring replacements when a worker walks away from a job simply because an employer will not immediately meet demands for a particular wage level and/or set of benefits. Additionally, employees enjoy the right to reinstatement based on seniority and job availability after a strike

Question: *DON'T EMPLOYERS ALWAYS HAVE THE UPPER HAND IN A STRIKE?*

Answer: Absolutely not. Strikes greatly disrupt business and no responsible employer seeks them. Furthermore, strikes confront employers with these choices:

(1) Shut down and lose all revenues.

(2) Incur the considerable costs associated with operating during a strike, including the recruitment, training and hiring of replacement workers.

(3) Meet the demands of strikers and risk business losses from being uncompetitive.

Finally, failure to bargain in good faith means the employer is engaging in an unfair labor practice and legally *cannot* replace strikers. Clearly employers do not enjoy an "upper hand" in a strike. Rather, strikes place extraordinary stress on their ability to continue operations, even if replacements are hired.

Question: *DOESN'T MANAGEMENT ALWAYS WIN IN A STRIKE SITUATION?*

Answer: No one wins when the mutual give-and-take of collective bargaining breaks down and results in a strike situation. Strikes cost businesses their revenues, workers their wages and communities their economic stability and civil tranquility. But if "winning" for management means labor's capitulation, recent events prove otherwise. The Pittston Coal and New York Daily News strikes both resulted in substantial concession to union demands. In the Eastern Airlines strike, management's failure to achieve a settlement with strikers contributed greatly to that company's going out of business. Strikes always cost businesses both in profits and productivity. Besides, the right to *strike* does not, and should not, guarantee the right to *win*.

Question: *WHY WON'T BUSINESS MEET LABOR HALFWAY AND AT LEAST ALLOW FOR A COOLING OFF PERIOD BEFORE HIRING REPLACEMENTS—OR HIRE ONLY TEMPORARY REPLACEMENTS?*

Answer: Every day of a so-called "cooling off" period would simply cost employers revenues and create an incentive only for management to settle. When a business cannot meet its commitment to customers because it is not operating, those customers simply go elsewhere. Once lost, they rarely return. Obviously, fewer customers results in job losses—often permanent. While hiring temporary replacements may be an option in some situations, in rural areas or areas without a ready pool of skilled workers willing to work temporarily it is not. Skilled workers will not leave permanent jobs for temporary work. A pool of temporary workers is more likely to consist of unskilled, unemployed, uneducated persons who cannot run sophisticated manufacturing operations. Additionally, strikes frequently involve violence and harassment of workers who cross a picket line. It is often difficult to find workers willing to run such a gauntlet for only a temporary job.

Question: *DIDN'T THE USE OF REPLACEMENT WORKERS GROW OUT OF THE LAISSEZ-FAIRE POLICIES OF THE REAGAN ADMINISTRATION AND INCREASE MARKEDLY IN THE '80S?*

Answer: No. Actually, the right of businesses to hire replacement workers to continue operations was recognized in 1938—the height of the New Deal. Since then, courts have regularly reaffirmed this right as part of the "free play of economic forces." An independent survey by the Employment Policy Foundation showed that the use of replacement workers has remained essentially constant since 1938. In the 1980s only four per cent of all striking employees were replaced in NLRB cases. The old saying "if it ain't broke, don't fix it" clearly applies to this legislation.

Question: *WHY CAN'T BUSINESS EVER SUPPORT THE RIGHTS OF WORKERS?*

Answer: Business has supported workers' right to organize, right to choose to affiliate with a union, right to strike and the obligation to bargain with labor in good faith and in meeting the requirements contained in unfair labor practice statutes and regulations. No one, however, ought to support a proposal that removes any reason for workers to bargain in good faith to avoid a strike. This legislation eliminates the delicate balance between the right to strike and the right for business to continue to operate.

Question: *ARE THERE ANY "HIDDEN" ELEMENTS IN THE LEGISLATION THAT ARE POTENTIALLY HARMFUL?*

Answer: The legislation will allow a handful of strikers to drag down an entire business. For example, in New York, a department store is required by law to have a given number of engineers, members of the Operating Engineers Union. Although the handful of engineers constitutes a tiny percentage of the workforce at the store, if they went on strike, the entire store would shut down until their demands were met. Thus, under the proposed legislation, a minority of the workforce could destroy a businesses' profitability—profitability which is critical to *both* labor and management—and could jeopardize the jobs of hundreds of other workers. Additionally, a provision in the legislation would further restrict worker choice by penalizing those workers who cross picket lines for personal or economic reasons.

Question: *IF THIS BILL WERE PASSED, WHAT WOULD KEEP WORKERS FROM ALWAYS GOING ON STRIKE WHEN THEY WANTED HIGHER WAGES OR BETTER BENEFITS?*

Answer: Nothing really. Current law provides incentives to both labor and management to reach an agreement and avoid a strike. If only an employer risks a loss in a strike then a union would most certainly use the strike weapon more frequently. The legislation would mean strikes would only damage an employer. And even if the bill were changed to protect only unionized workers, it is still fundamentally illogical and unfair. No worker ought to have the right to demand a wage, have an employer refuse, walk off the job, and at the same time prevent the employer from continuing operations by finding and hiring replacement workers.

Question: *WHO SHOULD DECIDE IF WORKERS' DEMANDS ARE REASONABLE?*

Answer: If the employer cannot find workers willing to accept its wages, then the employer cannot conduct business and will likely meet the demands of striking employees. Conversely, if an employer can find sufficient workers in the wider labor market who will accept its wages, then the union's demands are probably excessive and the strike will likely prove unsuccessful. It is important to note that an employer may not offer replacement workers wages or benefits beyond those of the final contract offer to the union-represented workers. In essence, the dynamics of the marketplace itself dictate whether or not workers' demands are reasonable.

Question: *WHAT WOULD THE LEGISLATION DO TO AMERICAN COMPETITIVENESS IN THE WORLD ECONOMY?*

Answer: By forcing an employer to accept demands for higher wages and/or benefits regardless of whether or not these added costs can be passed along in the marketplace, over time, the bill would logically result in making American products far too expensive to compete in Europe and Japan—countries that reject our entire collective bargaining system—or anywhere else in the world. The global economy has forced American business to cut waste and learn to operate more efficiently. This is paying off by opening new markets and cutting our trade deficit. The proposed legislation would literally destroy this new spirit of efficiency in American business and put us at a competitive disadvantage that would be impossible to overcome. In the final analysis, the legislation simply promotes strikes which would result in a decline in productivity, an increase in costs and an overall loss of competitiveness. We need legislation designed to keep Americans working. This legislation is not in the best interest of American workers.

STATEMENT OF ROBERT A. SIEGEL, ESQ.
PARTNER, O'MELVENY & MYERS
BEFORE THE
SUBCOMMITTEE ON AVIATION
COMMITTEE ON PUBLIC WORKS & TRANSPORTATION
U.S. HOUSE OF REPRESENTATIVES

APRIL 10, 1991

Mr. Chairman, Members of the Subcommittee, my name is Robert A. Siegel. I am a partner in the law firm of O'Melveny & Myers in Los Angeles, California. I have for several years specialized in airline industry labor relations law, representing many of the major air carriers. I presently serve as the Management Co-Chair of the Railway and Airline Labor Law Committee of the Labor Section of the American Bar Association. I am testifying today solely as an individual practicing attorney and not on behalf of the ABA or any other organization.

During the past several years, I have personally participated in, or counselled clients regarding, collective bargaining negotiations on behalf of major air carriers such as United Airlines, Pan American World Airways, and Flying Tigers. These negotiations have been with most of the major unions in the airline industry. Some of these negotiations have been short and sweet, others lengthy and difficult, but all have one thing in common -- each resulted in a negotiated settlement between labor and management.

My concern today is that H.R. 5, the striker replacement bill, would make it much more difficult to achieve reasonable, negotiated settlements when labor and management meet to discuss their differences. The bill would significantly shift the balance of power towards labor, by eliminating much of the risk that now exists when a union calls a strike. As a practicing labor negotiator, I fear that this legislation would upset the delicate balance which now exists in contract negotiations. Ultimately, I believe that the bill would undermine the stability of a bargaining process which, for over 50 years, has resulted in negotiated settlements between labor and management in the vast majority of cases.

The proposed legislation would overturn the Supreme Court's 1938 decision in NLRB v. Mackay Radio. MacKay Radio is premised upon the fundamental notion that management has the right to "carry on the business" during a strike. Without this right, management would have precious little bargaining power during contract negotiations. Federal labor law has long attempted to give both labor and management equivalent bargaining power, by permitting both parties to use their full economic clout as a last resort if negotiations prove fruitless. The striker replacement bill would seriously erode this long-standing principle. Unions could still use their full economic power by picketing or calling a strike, but management would be deprived of the

corresponding right to take all necessary steps to continue to operate its business. Not surprisingly, this would have two results: the union's incentive to make increased economic demands and to strike would be enhanced, and management's ability to resist unreasonable union demands would be diminished.

The central question is whether the current state of labor-management relations is so bad as to require such a radical change in a principle of law which was established more than 50 years ago. From my perspective it is not. The vast majority of contract negotiations in the airline industry ultimately result in mutually acceptable settlements between labor and management. The reason for this high rate of negotiated settlements is the fact that each side realizes that it may be very risky to use its full economic power. If the union's risk from using self-help is reduced, then it is easy to predict that unions will be quicker to use self-help as an alternative to bargaining. The result is that strikes will increase, and reasonable contract settlements will be more difficult to achieve.

Management knows that a strike or picketing is not good for business. This is especially true in the airline industry. Even with the right to permanently replace strikers, airline management knows that a strike makes it very difficult for any carrier to stay in business. Unlike

other industries, commercial airlines cannot afford to stop operating during a strike. Moreover, strategies which could be used by a manufacturing company -- such as stockpiling, subcontracting, or shifting work -- have no application in the airline industry. Similarly, relying solely upon temporary replacements, as might be done where unskilled labor is needed, is extremely difficult for airlines which require trained pilots and mechanics.

Because of these factors, labor and management in the airline industry are currently operating on a level playing field. Even though management has the right to use permanent replacements, labor unions possess the power to make it extremely difficult for a carrier to survive in the event of a labor strike. H.R. 5, however, would radically reshape the playing field, and tip the balance sharply in favor of labor.

Does it make sense to enact legislation that will encourage unreasonable economic demands, and increase the likelihood of strikes, in the airline industry? Clearly, it does not. Strikes by airline employees have an especially devastating effect on the travelling public, as well as the nation's economy. The nation's airlines, which collectively experienced a $2 billion loss last year, will face even more serious financial difficulties if Congress enacts legislation that enhances the likelihood of strikes. Eliminating

the risks inherent in calling a strike will only increase the number of strikes, or will compel carriers to acquiesce to unreasonable bargaining demands, which will result in greater inconvenience to airline passengers and deeper financial woes for the airline industry.

I realize, of course, that this legislation has been introduced largely in response to a few, well-publicized, labor disputes where employers permanently replaced union employees in order to operate during a strike. I want to stress that I am not testifying in favor of such destructive management-union confrontations. I have never personally participated in such a process, and I feel that those confrontations are not good for management, unions, or the public. The issue I am focusing on is whether H.R. 5 is the right way to address the problem. I believe it is not for at least two reasons: first, because it will adversely affect <u>all</u> negotiations, and second, because such sweeping regulation of the bargaining process is not necessary.

It is important to realize that most of these highly-publicized confrontations have not ended well for management. Eastern Airlines, for example, is now out of business for good after two years of operating with "permanent" replacements. Continental Airlines and TWA both face overwhelming financial difficulties after several years

of operating with permanent replacements. It is fair to say that the use of permanent replacements has proven to have extremely negative features which convince most employers to use other methods.

Indeed, the more successful air carriers are those who have settled their differences with the unions at the bargaining table. For example, in recent months, Delta, American and United have all settled rather lucrative contracts with their pilots. If management power was too great under current law, I do not believe these settlements would have been achieved.

From this record, there is no reason to fear that airline managements have a hidden agenda of bargaining tough, provoking strikes, and permanently replacing strikers. Instead, it is reasonable to predict that, in light of recent events, management at most airlines will continue to work within the existing, well developed framework of federal labor law and attempt to maintain industrial peace and stability at the bargaining table.

In closing, I urge the members of the subcommittee to recognize that this bill will reach far beyond those few employers who are willing to go to great lengths -- and take serious financial risks -- to permanently replace striking workers during a labor dispute. H.R. 5 would also

dramatically reduce the bargaining power of the vast majority of employers who peacefully resolve labor relations issues at the bargaining table. H.R. 5 will make it more difficult for employers to secure reasonable wage rates, or to achieve work rule changes that are required to increase operational efficiency. H.R. 5 will give unions a greater incentive to make excessive demands and to strike. H.R. 5 will lead to greater inconvenience for the travelling public, and further jeopardize the long-term outlook for many domestic air carriers that are trying recover from their worst year ever. H.R. 5 will erode a central principle of federal labor law which, for over 50 years, has permitted labor and management to peacefully resolve their differences in the vast majority of cases. H.R. 5 is not a good idea, and should not be enacted by Congress.

Thank you.

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MR. SIEGEL has for several years specialized in airline labor and employment law matters. He heads O'Melveny's airline industry labor law practice, and has represented United Airlines, Pan Am, America West, Flying Tigers, Federal Express, PSA, and StatesWest in labor negotiations, National Mediation Board matters, arbitrations and litigation under the Railway Labor Act. Mr. Siegel has also been labor counsel to several airlines regarding mergers, asset acquisitions, and ESOP transactions. Mr. Siegel is currently the Co-Chairman of the American Bar Association's Railway and Airline Labor Law Committee.

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